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# 80-1371

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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No. _____

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RICHARD WEGNER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

---

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## QUESTION PRESENTED

1. Whether or not a Defendant-Appellant appealing from a judgment of conviction in a criminal case entered in a United States District Court has a constitutional right to demand the conscientious judgment of a United States Court of Appeals on every assignment of error properly raised before that Court in accordance with the Rules of Appellate Procedure and 28 U.S.C. §1291?

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RICHARD WEGNER, Petitioner,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, Richard Wegner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 17, 1980.

## OPINION BELOW

The unpublished opinion of the Court of Appeals appears in the Appendix attached hereto. No opinion was rendered by the District Court for the Western District of Texas, San Antonio Division.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 17, 1980. A timely petition for rehearing en banc was denied on December 11, 1980, and this petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

## QUESTION PRESENTED

1. Whether or not a Defendant-Appellant appealing from a judgment of conviction in a criminal case entered in a United States District Court has a constitutional right to demand the conscien-

tious judgment of a United States Court of Appeals on every assignment of error properly raised before that Court in accordance with the Federal Rules of Appellate Procedure and 28 U.S.C §1291?

## STATUTORY PROVISIONS INVOLVED

United States Code, Title 28 §1291.

## STATEMENT OF THE CASE

On September 12, 1978, Richard Wegner (hereinafter "Petitioner") was charged by the Grand Jury for the United States District Court in the Western District of Texas, San Antonio Division, in Indictment No. S.A.-78-CR-185 for violating 21 U.S.C. §846. The same indictment brought charges against Richard Wegner for three counts of violating 18 U.S.C §2 as the same relate to violations of 21 U.S.C. §841(a)(1) by other persons. On November 14, 1978, the aforementioned indictment was superseded by Indictment No. S.A.-

78-CR-238, making substantially the same allegations and charges.

On November 20, 1978, Petitioner entered a plea of not guilty as to each Count of the indictment. A jury trial commenced in the City of San Antonio, Texas, on March 19, 1979. After a two-week trial, the jury returned a verdict of guilty as to all counts on March 30, 1979.

On April 20, 1979, Richard Wegner was sentenced pursuant to Title 18 U.S.C. §4205(b)(2) to four years' incarceration to be followed by a special parole term of four years as to each count, with Counts I, X, and XVIII, to be served concurrently and Count IV to be consecutive thereto. The Petitioner filed a notice of appeal, and had been at large on bail pending the final outcome of those proceedings.

Briefs were filed pursuant to said

appeal by Petitioner and the United States Government (a copy of Petitioner's brief and reply brief are in the Appendix attached hereto), and argument was heard before the United States Court of Appeals for the Fifth Circuit in New Orleans, Louisiana, on July 16, 1980. On July 17, 1980, the Court of Appeals for the Fifth Circuit issued an unpublished opinion wherein the Court affirmed the conviction of Petitioner.

Petitioner then filed a Petition for Rehearing and Suggestion for Rehearing en banc. A copy of the petition is in the Appendix attached hereto. In a letter dated December 11, 1980, from the Clerk for the United States Court of Appeals for the Fifth Circuit, counsel for Petitioner was advised that Petitioner's Petition for Rehearing and Suggestion for Rehearing en banc was denied. A copy of the letter is

in the Appendix attached hereto.

Thereafter, on December 29, 1980, the opinion of the United States Court of Appeals for the Fifth Circuit was issued as mandate. Pursuant to the issuance of mandate, Petitioner was informed that he was to surrender himself to the United States Marshall Service on Tuesday, January 20, 1981, in San Antonio, Texas. Upon motion of Petitioner, an order was entered permitting Petitioner to voluntarily surrender to the place of his incarceration at the United States Penitentiary at Terre Haute, Indiana.

REASONS FOR GRANTING THE WRIT

1. THE COMPLETE FAILURE OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT TO PROVIDE A CONSCIENTIOUS JUDGMENT ON EVERY ASSIGNMENT OF ERROR PROPERLY RAISED BEFORE THAT COURT AND THE COMPLETE FAILURE OF THE COURT OF APPEALS TO ADDRESS THE ISSUE RAISED IN THE PETITION FOR REHEARING OF THE DEFENDANT-APPELLANT'S RIGHT TO A CONSCIENTIOUS JUDGMENT ON EVERY ASSIGNMENT OF ERROR PROPERLY RAISED ON APPEAL LEAVES AN IMPORTANT QUESTION OF FEDERAL LAW UNSET-

TLED.

It is the Petitioner's position that a defendant appealing from a judgment of conviction in a criminal case entered in the United States District Court has a constitutional right to demand the conscientious judgment of a United States Court of Appeals on every assignment of error properly raised before that Court in accordance with the Federal Rules of Appellate Procedure and 28 U.S.C. §1291. The United States Supreme Court has held that there is no constitutional right to an appeal from a criminal conviction. Abney v. United States, 431 U.S. 656 (1977). However, in the federal system, it is clear that 28 U.S.C. §1291 provides a statutory right to appeal from a criminal conviction. See Coppedge v. United States, 369 U.S. 438 (1967); Carroll v. United States, 369 U.S. 438 (1962); and

Blewen v. United States, 375 F.2d 285 (5th Cir. 1967). This right should not be frustrated. Rodriquez v. United States, 395 U.S. 327 (1969). This right also carries with it both the right to counsel and concommitant duties upon counsel. These duties include examining the trial court record for errors and urging the reviewing court to grant relief therefrom. See Hardy v. United States, 375 U.S. 277 (1964).

In an early decision of the Court in Post v. Jones, 19 How. 150, 15 L.Ed. 618 (1856), it was held that where the law gives a party an appeal, he has a right to demand the conscientious judgment of the appellate court on every question arising in the cause. Post, supra, at 160. The Fifth Circuit has also acknowledged that an appeal is an integral part of the trial system for finally adjudicating the guilt

or innocence of a defendant. Thomas v. United States, 368 F.2d 941, 945 (5th Cir. 1966). It is therefore axiomatic that where alleged errors of the trial court have been properly preserved and urged upon a United States Circuit Court of Appeals, the Court of Appeals has a duty to consider each of them before rendering judgment.

In the case at bar, Richard Wegner presented two issues for review to the United States Court of Appeals for the Fifth Circuit. The first was whether or not he was deprived of his rights to confrontation, cross-examination, and effective assistance of counsel by the admission into evidence without proper foundation of computer printouts of telephone toll records. In its per curiam opinion decided within a day of oral argument, pursuant to Local Court Rule 21, the panel

disposed of this issue by stating:

> Defendant-Appellant WEGNER alleges that he was denied a fair trial, because he was deprived of his rights of confrontation and cross-examination, as guaranteed by the Sixth Amendment to the United States Constitution, when the Court admitted computer print-outs of telephone toll records into evidence, and we find this allegation of error without merit, and we affirm his conviction. Opinion of July 17, 1980, page 2.

The second issue presented to the United States Court of Appeals for the Fifth Circuit, which the Court completely failed to address, was whether or not Petitioner was deprived of his liberty without due process of law and a fair trial in light of the prosecution's misconduct in obtaining testimony, and in cross-examination, and the Court's charge to the jury. The argument in support of Defendant's contention encompassed sixteen (16) pages of the Appellant's Brief and

two additional pages in his Reply Brief. Two of his primary contentions in regard to that argument were of such a nature as to require the Fifth Circuit to clarify the question as to whether United States v. Mendoza, 565 F.2d 1285, affirmed en banc, 581 F.2d 89 (5th Cir. 1978) permitted a trial judge to forestall ruling on a motion made pursuant to Rule 35 of the Federal Rules of Criminal Procedure until after the Movant testified on behalf of the Government, at the Government's request, some 210 days after sentence was imposed and some 90 days beyond the 120 day limitation on Rule 35 Motions. The second contention would have required that Court to either reverse or to distinguish the closing argument in the instant case from that of United States v. Garza, 608 F.2d 659 (5th Cir. 1979). It was submitted in the Appellant's Brief and it was

submitted in the Petition for Rehearing and Suggestion for Rehearing en banc that the summation of the prosecutor in the instant case was even more prejudicial and inflammatory than that of Garza. The United States Court of Appeals for the Fifth Circuit completely and unequivocally failed to address these issues in its cursory opinion issued in the instant case. As such, Defendant believes that this failure of the appellate court to address the issues raised on appeal created a meritorious issue for consideration by the Supreme Court of the United States on Petition for Writ of Certiorari.

It is respectfully submitted that an examination of the three page opinion of the panel which is attached in the Appendix will demonstrate to the Court that the first issue presented by Petitioner was not analyzed by the Court at all in

its opinion and the second issue presented for review on appeal was not given any consideration whatsoever by the panel and therefore Petitioner was deprived of due process and equal protection of law as guaranteed to him by the United States Constitution, Amendment Five. Surely, if Post, supra is to be given any credence at all, it must apply equally to all members of the class to which it was directed. This was certainly not done in the instant case.

The complete failure of the United States Court of Appeals for the Fifth Circuit to address the aforementioned issues raised by Petitioner leaves important questions of federal law unsettled as to the specific issues raised by Petitioner and also leaves unsettled the fundamental question of whether a defendant-appellant in a criminal case is entitled to the con-

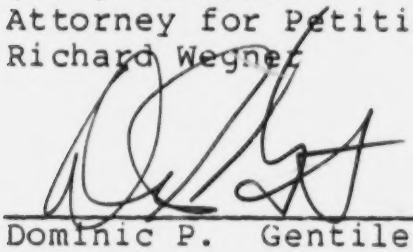
scientious judgment of the Court of Appeals on all issues of errors that are properly raised by a defendant-appellant. These are issues which the Supreme Court of the United States, it is respectfully submitted, should settle.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectful ly submitted,

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Richard Wegner



Dominic P. Gentile, Esquire

CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing were sent by United States Mail to the following:

The Solicitor General
Department of Justice
Washington, D.C. 20530

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DAVID Z. CHESNOFF, ESQUIRE

# APPENDIX

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

FILED
DEC 31 1980
CHARLES W. VAGNER, Clerk
By Deputy

No. 79-5262

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOE M. MALDONADO, FEDERICO CRUZ, and

Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas

(JULY 17, 1980)

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

PER CURIAM:

Defendant-Appellant Joe M. Maldonado was convicted by a jury of conspiracy to possess marihuana, with intent to distribute, and possession of marihuana, with intent to distribute.

Defendant-Appellant Richard Wegner was convicted by a jury of conspiracy and aiding and abetting the possession of marihuana, with intent to distribute.

Defendant-Appellant Federico Cruz was convicted by a jury of conspiracy to possess marihuana, with intent to distribute, and of aiding and abetting the possession of marihuana, with intent to distribute.

EXHIBIT B

rather than the single conspiracy alleged in the indictment, and that his constitutional guarantee of confrontation of all adverse witnesses was violated when the trial court unduly restricted his cross-examination of a witness by the name of Acosta, when he testified for the Government. We find all of the contentions to be without merit, and, therefore, affirm his conviction.

AFFIRMED. See Local Rule 21.[1]

Issued as Mandate: DEC.2 9 1980

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1 See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

A true copy

Linda Johnson

DEC.2 9 1980



EXHIBIT B

# 79-5262

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 79-5262

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD WEGNER,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas, San Antonio Division

## BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 79-5262

---

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD WEGNER,
Defendant-Appellant.

---

## CERTIFICATE OF COUNSEL

The undersigned counsel of record certifies that the following listed person has an interest in the outcome of this case. This representation is made in order that the Judges of this Court may evaluate both disqualification or recusal pursuant to Local Rule 13.6.1:

Richard Wegner, Defendant-Appellant herein.

---

DOMINIC P. GENTILE
1200 South Maryland Pkwy.
Las Vegas, Nevada 89104
Attorney for Defendant-
Appellant

## REQUEST FOR ORAL ARGUMENT

The defendant-appellant, RICHARD WEGNER, requests oral argument in this matter. The Report of Proceedings at the trial of this cause consists of 1,710 pages, exclusive of the common law record. The trial of this case took two full weeks. The issues presented to this Court relate to the prejudicial effect of the admission of a specific piece of evidence, which was greatly relied upon by the prosecutor throughout his case in chief, the cross-examination of the defense witnesses, and summation. Furthermore, the issues relating to due process and prosecutorial misconduct cannot be as vividly described by the printed word and a cold record as it can by oral presentation indicating the general tenor and mood of the proceedings in the trial court below.

Finally, to the extent that this Court would require the resolution of issues that are included within its decision-making process, but which have been either unnoticed or assumed by the appellant in his brief, only oral argument will present an opportunity to confront and clarify these problems.

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 79-5262

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UNITED STATES OF AMERICA,
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versus

RICHARD WEGNER,
Defendant-Appellant.

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Appeal from the United States District Court for the Western District of Texas, San Antonio Division

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# BRIEF OF APPELLANT

---

## ISSUES PRESENTED FOR REVIEW

1. Was the defendant deprived of his rights to confrontation, cross-examination, and effective assistance of counsel by the admission into evidence, without proper foundation, of computer print-outs of telephone toll records?

2. Was the defendant deprived of his liberty without due process of law and a fair trial in light of the prosecution's misconduct in obtaining testimony,

cross-examination and summation, and the Court's charge to the jury?

## STATEMENT OF THE CASE

### A. Course of Proceedings and Disposition in Court Below.

On September 12, 1978, RICHARD WEGNER (hereinafter "defendant" or "appellant"), was charged by the Grand Jury for the United States District Court in the Western District of Texas, San Antonio Division, along with eleven others, in Indictment No. S.A.-78-CR-185 for violating 21 U.S.C. §846. The same indictment also brought charges against RICHARD WEGNER alone for three counts of violating 18 U.S.C. §2 as the same relate to violations of 21 U.S.C. §841(a)(1) by other persons. On November 14, 1978, the aforementioned indictment was superseded by Indictment No. S.A.-78-CR-238, making substantially the same allegations and charges.

On November 20, 1978, Defendant WEGNER entered a plea of not guilty as to each Count of the indictment. A trial commenced before the Hon. Dorwin Suttle, District Judge, sitting with a jury, in the City of San Antonio, Texas, on March 19, 1979. After a two-week trial, the jury returned a verdict of guilty as to all counts on March 30, 1979.

On April 20, 1979, Defendant WEGNER was sentenced pursuant to Title 18, U.S.C. §4205(b)(2) to four years' incarceration to be followed by a special parole

term of four years as to each count, with Counts I, X, and XVIII to be served concurrently and Count IV to be consecutive thereto. The defendant filed a timely notice of appeal, and is at large on bail pending the outcome of this proceeding.

## B. Statement of Facts Relevant to Issues Presented

(The following statement of facts is presented as a summary of the evidence, in chronological order, that was presented to the trial court. It includes "facts" which were unknown to the jury as a result of *voir dire* examinations which took place outside of the hearing of the jury.)

### (1) Prosecution's case in chief:

*Ms. Jamie Smith*

Jamie Smith testified that she is an assistant manager at the Holiday Inn in Itasca, Illinois, and has care, custody and control over the records of that establishment [Tr. 62]. She identified government's exhibits 8A through 8F as being business records of Holiday Inn, and indicated that they represented registration slips and copies of a bill [Tr. 63, 64]. The relevant portion of her testimony dealt with the fact that on May 5, 1977, a Richard Silva apparently registered as a guest at that hotel and checked out on May 7, 1977 [Tr. 66]. It also indicated that on April 10 and 11, 1978, a Joe Silva registered as a guest at that hotel [Tr. 67].

On cross-examination by counsel for WEGNER, it was established that Itasca, Illinois has a substantial Mexican-American population, and that the Holiday Inn in Itasca was contiguous to a major thoroughfare, which could be seen from its premises, and was one and one-half (1½) miles from the ingress/egress thereto [Tr. 70, 71]. She also testified that whenever phone calls were made from the rooms, the operator would ask for the identity of the room number and would make a charge slip indicating what number was called and how long the parties talked [Tr. 78]. It was also established that in the May, 1977 registrations there was one adult staying in Room 223, and two adults and two children in Room 221 [Tr. 79].

*John Connolly*

Mr. Connolly testified that he was employed by Illinois Bell Telephone Company as a security representative in Chicago, Illinois, and part of his duties was to be keeper of the records. Mr. Connolly testified that government's exhibits 11 and 12 were made in the ordinary course of business of Illinois Bell Telephone, and that they were original records [Tr. 82, 83]. He further testified that government's exhibit No. 11 indicated that the subscriber was the Defendant RICHARD WEGNER; and with respect to government's exhibit No. 12, the subscriber was Gates Washer & Manufacturing Company. The witness indicated that RICHARD WEGNER was listed as the general manager of that company [Tr. 83, 84]. The witness testified as to how the records should be interpreted with respect to the telephone calls listed thereon [Tr. 85]. Under cross-

examination, the witness testified that it was impossible to tell from the records who made the call or who received the call [Tr. 98]. The witness was unable to testify as to the nature of the computer system, although he did indicate that there were two different systems used (one for each exhibit). He was unfamiliar with the programming and indicated that there may be as many as one hundred (100) people responsible for the programs. He did not enter the order for these print-outs, did not retrieve them himself, and did not see them made [Tr. 101, 102].

*Richard Froehlich*

Richard Froehlich testified that he was security supervisor with Southwestern Bell in San Antonio, and that he was responding to a subpoena. He identified government's exhibits Nos. 9, 10, and 13 as the records of Southwestern Bell. He indicated that government's exhibit No. 9 was a telephone listed to Jose Silva; government's exhibit 10 was a telephone subscribed to by Frank Acosta; and that government's exhibit 13 was listed to Ysidro Rodroquez, all of San Antonio [Tr. 106-109].

*Frank Acosta*

Frank Acosta testified that his name is Francisco Acosta, that he was forty (40) years old, had been the beneficiary of a tenth grade education, has been married eleven (11) years, and had two children. He was last employed doing body work on automobiles, when he owned his own shop [Tr. 318, 319]. On August 23, 1977, he was arrested in Jim Hogue County, Texas, and

charged with an offense involving marijuana. He testified that Richard Silva was his partner in the marijuana and body shop business [Tr. 324]. He further testified that he delivered marijuana in October, 1977, to a man he knew as "Big Rich" in Chicago, Illinois. He also testified that Juventino Rodriguez and Steve Romo drove the load of marijuana to Chicago [Tr. 325, 326]. The marijuana was delivered to a place that was held out to Frank Acosta to be the home of RICHARD WEGNER, whom he identified in open court [Tr. 326, 327].

Acosta started in the marijuana business in 1976 with Richard Silva, when he started allowing the latter to unload marijuana at the body shop [Tr. 341, 342]. He flew to Chicago and met Romo and Rodriguez when he got there [Tr. 349, 350]. He collected $18,000 from Defendant WEGNER in exchange for the marijuana [Tr. 352]. He had traveled to Chicago on an earlier occasion with Richard Silva, when the latter said that they met with and received $8,000 from RICHARD WEGNER [Tr. 353]. He has been incarcerated for one year on a sentence of forty-five (45) years, and was told by the government that if he would cooperate, there was a chance that his sentence would be reduced because the government would speak with the judge to see if he would grant the reduction [Tr. 354]. He had previously signed a sworn statement within which he said that he had delivered more than one load to RICHARD WEGNER, because he did not want the government to know "what was going on out there," [Tr. 355-357].

Richard Silva had told him that he was delivering marijuana to "Big Rich" in Chicago before he and Acosta started doing business [Tr. 358]. He previously testified before the grand jury that he delivered the marijuana to a warehouse in Chicago, but that statement was false and had been made because he didn't want the grand jury to know that it was delivered to WEGNER's house [Tr. 360, 361]. He also stated before the grand jury that he did not see the $18,000 because, "I just didn't feel like saying . . . . I mean, I lied about it," [Tr. 362]. He also testified before the grand jury that he took some marijuana to Chicago with Mauricio Gutierriez, but that also was not true [Tr. 362]. On cross-examination, Acosta admitted that he confessed to crimes carrying a maximum aggregate sentence of over two hundred (200) years during his conversations with the D.E.A. [Tr. 375].

Acosta admitted that prior to testifying he had been shown papers indicating the deal on marijuana, how many times and loads the other witnesses said were unloaded in Acosta's shop, who was involved with each deal. These documents were prepared by other people, and were shown to Acosta the day before he testified as well as a couple of other times. They were shown to him every time the D.E.A. went over the statements and the story with him [Tr. 388, 390]. Acosta met with Agent John Wolken in December of 1977, and five or six times between then and the time of his arrest. He was shown reports during these meetings that were prepared by other people, and that related deals that Acosta had made. These reports also mentioned the names of Juventino Rodriguez and Esteban Romo,

along with the name of Richard Silva [Tr. 394, 395]. They also went over it since August 30, 1978 on several occasions [Tr. 396]. He has been incarcerated at Uvalde County Jail since April of 1978. He was arrested with Esteban Romo, and both of them were transferred to Uvalde County Jail at the same time.

Acosta did not know the name, RICHARD WEGNER until the D.E.A. told him that that was "Big Rich's" name [Tr. 402]. Richard Silva had promised Acosta that he would make a lot of money dealing in heroin and marijuana, but he lied to Acosta [Tr. 404]. In December of 1977, Agent Latson of the D.E.A. told Acosta that if he cooperated with the D.E.A. he would not get into any trouble. Eight months later, he was sentenced to forty-five (45) years [Tr. 406]. Acosta believes this is because he wasn't "cooperating fully" with the D.E.A. [Tr. 406].

Government exhibit No. 2, which is a telephone book, belongs to Yolanda Silva and was given to Acosta, but he does not recall when [Tr. 409]. Acosta testified that he was probably in Chicago the week between October 18 and 25, 1977 [Tr. 415].

In addition to fixing and painting automobiles, Silva and Acosta also sold some on a lot next door to the body shop. RICHARD WEGNER sold automobiles to Silva, and Acosta had never met WEGNER but had seen him once in San Antonio [Tr. 421, 422].

On June 7, 1978, Acosta gave a statement to D.E.A. agents Latson and Wolken, indicating that he had made

deliveries to Chicago in February of 1976 for $8,000 and in April of 1976 for $18,000. He also indicated a delivery in April of 1977 for $18,000, and never mentioned any trip in October of 1977 [Tr. 423, 424]. He did not want to start telling the truth until after he received his forty-five year sentence [Tr. 427]. He believed Defendant WEGNER to be between six feet (6') and six feet-two inches (6'2") in height [Tr. 428]. He believed that the reason he got forty-five years is because he did not cooperate [Tr. 431, 432].

When the D.E.A. agents were debriefing Acosta, they told him how many times he had delivered heroin, and they came up with a figure; he then agreed to it [Tr. 437]. That was the general manner in which interviews took place betweeen Acosta and the D.E.A. [Tr. 438]. He had spoken with D.E.A. agents approximately fifteen times between December of 1977 and March of 1979, but refused to speak to an investigator for the Defendant WEGNER who came to visit him while at Uvalde County Jail [Tr. 439, 440]. He had been advised by the prosecutor and the D.E.A. agents that he did not have to talk to Defendant WEGNER, or his investigators or lawyers [Tr. 440].

He was represented by counsel after being arrested on the federal charge, and he discussed the matters involved therein truthfully with his counsel. After their discussion, his lawyer filed motions in his behalf, and based those motions upon what Acosta told him [Tr. 440, 441].

Frank Acosta refused to answer questions asked of him on cross-examination by counsel for WEGNER re-

lating to statements made by him to his counsel and incorporated in a Motion to Suppress filed in his behalf in the case for which he was sentenced to his forty-five years (Indictment S.A. 78-CI-122). He denied having told his attorney that prior to being arrested on the federal charges, he was working for the D.E.A. and trying to assist the agents. He refused to answer as to whether he told his attorney that he was conducting a joint operation with the D.E.A. to arrest various persons involved in the narcotics business [Tr. 459]. He refused to say whether he told his attorney in a conversation at the Uvalde County Jail, that he was working for the D.E.A. [Tr. 460]. He then stated that he told his attorney that he was not working for the D.E.A. when he conferred with him at the Uvalde County Jail. [Tr. 452].

He refused to answer whether he told his attorney, while conferring with him at the arraignment, that the seven ounces of heroin which he purchased from George Escamilla on April 25, 1978, was an attempt to set-up Escamilla at the direction of the D.E.A. [Tr. 463]. He also refused to answer as to whether he said that to his attorney at the Uvalde County Jail [Tr. 463]. He refused to answer as to whether he told his attorney, either at the arraignment or at the Uvalde County Jail, that the seven ounces of heroin he delivered to Albert Castro on April 27, 1978, was part of a D.E.A. operation [Tr. 464, 465]. He refused to answer as to whether he told his attorney at the arraignment that the D.E.A. was intimidating, threatening, and coercing him to assist them, or that he was being coaxed and bribed by the D.E.A. to do so [Tr. 465, 466]. He did tell his attor-

ney that the D.E.A. was forcing him to "cooperate" [Tr. 466]. He continued to refuse to respond to questions of this nature, or to deny having said them to his attorney [Tr. 466-473]. On being presented Defendant WEGNER's exhibit No. WC, and having had an opportunity to examine it [Tr. 474], he recognized it as a Motion to Suppress filed on his behalf by his attorney after he discussed the facts with him [Tr. 475].

When the testimony resumed in the presence of the jury, Acosta admitted that he told things to his attorney which could be interpreted as his attorney did in the Motion to Suppress (exhibit WC) filed on his behalf [Tr. 485, 489]. He also admitted that he lied to his attorney at that time as to some other things [Tr. 490].

When Acosta was sentenced on August 30 of 1978, he was informed that he had one hundred twenty (120) days to seek a reduction of his sentence, or until December 10, 1978. He filed a motion on November 29, 1978, and he knew that on December 6 of 1978, the *government filed a motion asking the judge not to rule until after he testified* [Tr. 491]. He is aware that over two hundred (200) days have passed since his sentencing and that the judge has still not ruled, but *expects that the government will make his cooperation known to the judge after this trial* [Tr. 492].

The government agents told Acosta that they had an airline ticket showing that he flew to Chicago in October, of 1977, and motel records. At first Acosta said they showed him these tickets, but later recanted this testimony and denied it [Tr. 495, 497].

Upon being cross-examined as to the amount of money which was received for the one hundred-three (103) ounces of heroin (for the purpose of establishing inducements, bias, motive, etc., for testifying falsely), Acosta refused to answer and the trial court refused to permit cross-examination, holding that such questions as to any deals made with the government, or Acosta's expectations, regarding charges of failing to file income taxes were "extraneous offenses" and impermissible cross-examination for these purposes [Tr. 500]. Acosta also refused to answer as to whether it took $.25 million to run his drug dealing operations [Tr. 503]. The government objected to this question later, and the Court sustained it [Tr. 504].

Acosta sold a lot of automobiles while he was running the garage, and at least one of them went to Mexico. At the time that he and Steve Romo were arrested, Romo was in possession of a gun given him by Acosta [Tr. 509, 510].

*Juventino Rodriguez*

The witness stated that he is twenty-eight (28) years old, was born in San Antonio, and had a tenth grade education. He was honorably discharged from the U.S. Marine Corps, and served in Viet Nam one year. He stated he has one child, has been married four and one-half (4½) years, and started using heroin when he was in Viet Nam. He was addicted to heroin while he was in the service, and last used heroin in June of 1978. He knows Richard Silva because his sister married Richard Silva's brother. He was involved in the marijuana

business in 1977 with Richard Silva, when the latter asked if he would go to Chicago with him [Tr. 555-557].

He was in the Holiday Inn in Chicago, Illinois on May 5, 6 and 7 of 1977, and went there with Richard Silva and his family. He did not register as a guest at that time [Tr. 560, 561]. On that trip to Chicago, he took marijuana in the trunk of an automobile and delivered the marijuana along with a man named Mescla, to a nuts and bolts warehouse belonging to Defendant WEGNER [Tr. 562, 563]. He identified government's exhibits 30A and 30B as photographs of the warehouse that he went to to deliver the marijuana. He stated that "Big Rich" was there at the time [Tr. 563, 564]. He further testified that "Big Rich" was standing at the dock watching the marijuana being unloaded, and later saw money in the possession of Richard Silva, which the latter said "Big Rich" had given him [Tr. 564, 565].

He knows a man named Steve Romo, and went to Chicago with him in October of 1977, "when Leonard Skinnard died" [Tr. 565]. He and Romo went to Chicago to leave a truckload of marijuana at the orders of Richard Silva. They picked up the marijuana from Frank Acosta's house in San Antonio [Tr. 566]. He was instructed by Richard Silva that Frank Acosta would meet them (Rodriguez and Romo) in Chicago [Tr. 567]. At this time, the government produced its exhibit 24, which was a San Antonio newspaper dated October 21, 1977, reporting the "Leonard Skinnard air crash," [Tr. 570].

Rodriguez stated that he made an additional delivery of marijuana to Defendant WEGNER at his home, along with Joe Silva, and identified government's exhibit 7B as a photograph of that home [Tr. 571, 572]. He also delivered three hundred pounds of marijuana to Defendant WEGNER's "pottery shop," which he identified in government's exhibit 7A [Tr. 578].

He has entered a plea bargain, and has pleaded guilty to a single count "of marijuana" and is testifying as part of that plea bargain. He is under the impression that the maximum sentence that he will get will be five years if he cooperates with the government, but he has not yet been sentenced [Tr. 584].

The only other time he met Defendant WEGNER was at Richard Silva's house in San Antonio, when Defendant WEGNER was bringing back some marijuana that was no good and was going to Mexico to buy some pottery [Tr. 585-586]. On cross-examination, Rodriguez stated that when driving to Chicago, he knows that you have to go through Dallas but does not remember what cities in Oklahoma. He does not know what freeway is taken, but it goes through St. Louis and Springfield, Illinois, then to Chicago [Tr. 617, 618]. He drove "as many miles as I had to drive" to get to Chicago. He would call Richard Silva whenever he got to Chicago, but one time called him from Springfield, Illinois [Tr. 626].

He testified that when he delivered the marijuana to the "nuts and bolts warehouse," he backed the car into the dock area [Tr. 630, 631].

He made a delivery of marijuana on October 20, 1977 to Defendant WEGNER [Tr. 632]. He does not recall what time he made the delivery, but remembers that a telephone call was made after the delivery [Tr. 632, 635]. All of the trips for the delivery of marijuana involved the same person in Chicago [Tr. 635].

When he met Defendant WEGNER in San Antonio, it was a "little bit important" day because he was planning to go to a dance that night with a girlfriend [Tr. 636]. He remembers that Defendant WEGNER sent him out to buy beer and asked him to go to the races, but he declined because he had a date with his girlfriend [Tr. 637].

He testified that he was transferred to Uvalde County Jail the day after he was arrested (September 14, 1978), and remains at the Uvalde County Jail as of the time of his testimony during this trial [Tr. 639-640]. He was in Uvalde County Jail about three weeks before he signed his statement. The D.E.A. agents talked to him about the statement before he signed it [Tr. 640]. When he was in Uvalde County Jail, he knew that Acosta had received forty-five (45) years, and that each count against him could bring fifteen (15) years [Tr. 641].

He made Five Hundred Dollars ($500) for each of three trips to Washington, five trips to Chicago, and twelve trips to Mexico [Tr. 645]. He left his wife three

months before his daughter was born, and didn't move back in with her until a couple of months before he was arrested on the instant charge. Only one time did he buy his daughter some clothes out of the money that he made, he paid no taxes on the money, filed no tax returns, has not been told by the government that he will not be prosecuted for his tax violations or fraud on the Public Aid Department but has not told them about it [Tr. 647, 648].

His daughter, April Lynne, was born April 28th. Notwithstanding the fact that he testified on direct examination that he had one child, he has two additional children, Rita Rodriguez and Reuben Rodriguez. He does not remember the ages of either child [Tr. 651]. He has been using one and one-half (1½) grams of heroin a day from the time he left his wife in 1977 (notwithstanding the fact that he said on direct examination that he did not use drugs after leaving Viet Nam) [Tr. 652]. He left his wife three months before April 28, 1977, which was the date that his daughter was born. When he was in Viet Nam, he would use heroin when he was on MED-EVAC duty (i.e., where he picked up wounded soldiers) [Tr. 656].

*Steven Romo*

The witness is thirty-one (31) years old; he is a high school graduate with forty-one (41) college credit hours, and makes his home town in San Antonio, Texas. He got an honorable discharge from the U.S. Army, and while in the service was in Viet Nam as an airborne infantryman. He became involved with opium

and heroin while in Viet Nam, and used them until April 23, 1978, which was the day that he was arrested along with Frank Acosta for the sale of heroin to federal agents [Tr. 699-701].

In the third week of October in 1977, Richard Silva offered him a job delivering marijuana to Chicago. He was to receive $3.50 per pound for delivering it, and took up two hundred fifty (250) pounds to a person named "Big Rich" in Chicago. He was accompanied by Juventino Rodriguez [Tr. 701, 702]. He picked up the marijuana at Frank Acosta's house, and drove non-stop to Chicago. He had never met "Big Rich" before this occasion [Tr. 703, 704]. Richard Silva told him that "Big Rich" could move five hundred (500) pounds of marijuana in a week [Tr. 705]. Richard Silva told them to take a cut-off at the "Old Chicago Building" and take the long road to Itasca, Illinois, a trip that would be twenty (20) or thirty (30) miles [Tr. 706]. He testified to having some conversation with "Big Rich" at that time [Tr. 707, 708].

He has been convicted of four felonies: illegal importation of controlled substance in 1973 (cocaine), for which he received a ten (10) year sentence; carrying a prohibited weapon (sawed-off shotgun), for which he received a two-year sentence; another charge for carrying a prohibited weapon (a .32 cal. Derringer), for which he received a two-year sentence; and using the telephone to commit a felony (a sale of heroin), for which he received a four-year sentence, and for which he has been incarcerated since April 27, 1978. He is

testifying in court because of a plea bargain with the government in exchange for which they would dismiss charges against him [Tr. 713].

On cross-examination, the witness testified that he was arrested along with Frank Acosta, and became addicted to heroin while in Viet Nam after he had been there only two weeks [Tr. 718, 719]. His total tour of duty in Viet Nam was one month.

On his trip to Chicago in October, the route was from San Antonio through Austin and Dallas, Texas, Oklahoma City and Tulsa, Oklahoma, Springfield and St. Louis, Missouri, Springfield, Illinois, and through Joliet to Chicago [Tr. 720]. When Romo testified at an earlier hearing, he said that Defendant WEGNER was six feet (6') or six feet-one inch (6'1"), but at the time the defendant was not in the courtroom. Now that he has seen him, he says that Defendant WEGNER is "well over six feet" [Tr. 740].

*John Wolken*

The witness testified that he was a Special Agent, Department of Justice, Drug Enforcement Administration, and has been there since 1973. Prior to that he was with the Department of Treasury since 1967, and has been part of the investigative unit in this case along with Special Agent Skip Latson. The witness identified government's exhibits 9, 10, 11, 12, and 13, and testified that he examined those records in depth and prepared from them government's exhibits 18 and 33A through E [Tr. 756-766].

(2) Defense case:

*Ralph Cofield*

The witness is employed at LaQuinta Motor Inn, a motel on Route 35 and U.S. Military Highway, San Antonio, Texas, and has been employed there for two years, the last four months of which has been as manager. He is the custodian of the business records, and the method of registering guests at the hotel has not changed in the two years that he has been there [Tr. 1023, 1024]. He identified defendant's exhibits WJ, WK, and WL as registration slips filled by guests and records of billing from the motel [Tr. 1025]. On April 26, 1978, Alamo Drag Raceways guaranteed two rooms for four people for two nights. Alamo Drag Raceways has a monthly billing account [Tr. 1026]. On April 26 of 1978, a Mr. Scott Collins filled out the registration slip, indicating that he intended to depart on April 28, 1978. He registered for two persons at that time, but did not indicate the name of the other person [Tr. 1028]. According to defendant's exhibit WK, the people who occupied the room from April 26 did not check out until April 30 at 12:47 p.m. [Tr. 1029].

*Alice Armstrong Jorgensen*

The witness lives in Gurnee, Illinois, and has two children, a boy age twenty (20) and a girl age eighteen (18). She has been employed by Gates Washer & Manufacturing for almost six years. The business was established by her father fifty-one (51) years ago [Tr. 1034-1036]. Gates Washer is in the business of making specialty washers and stampings [Tr. 1036]. When she

joined Gates Washer, she held the post of vice president and became president one and one-half (1½) years later. She employs between thirty (30) and forty (40) people [Tr. 1037-1038]. She is also president of Superior Fastener Corporation, which shares space with Gates Washer. Both companies are located at 9536 West Foster Avenue in Chicago. Superior Fastener makes wood joiners [Tr. 1038-1040]. Gates Washer has never been equipped to make nuts or bolts, and never has made any, nor has it ever stocked any [Tr. 1041, 1042]. Neither has Superior Fastener.

The witness knows Defendant WEGNER, and met him in July of 1974 while he was working as a tool and die maker in the tool room at Gates Washer [Tr. 1044, 1045]. Defendant's exhibit WN are the employment records of Gates Washer & Manufacturing as they relate to Defendant RICHARD WEGNER's employment. The witness is the keeper of the records, and transported them to Court. They indicate that Defendant RICHARD WEGNER started his employment July 23, 1973 [Tr. 1045, 1046].

Defendant RICHARD WEGNER became general manager of Gates Washer on March 11, 1975. The witness has never been a social friend of Defendant WEGNER, and her knowledge of him is limited to his working with her [Tr. 1051]. As part of his duties as general manager, Defendant WEGNER was required to travel all over the country. As part of his duties as general manager, he also acted as sales manager [Tr. 1051, 1052]. Prior to leaving his employment at Gates Wash-

er, Defendant WEGNER, the witness, and another person, formed a corporation known as Progressive Design. Defendant WEGNER ultimately bought out the other two and at the time he was leaving Gates Washer, told the witness that he was going to use Progressive Design for the export and import of decorative art. [Tr. 1055].

When he left Gates Washer, RICHARD WEGNER agreed to remain as a consultant and a salesman for the southwest territory, which includes San Antonio [Tr. 1056, 1057]. The witness placed an ad in the San Antonio telephone directory three or four years ago and it has been in there constantly, advertising Gates Washer & Manufacturing with a telephone number 312/992-3737 [Tr. 1057, 1058].

The witness testified that in May of 1977 she had a 1974 Mustang, and it would have been impossible to have backed that Mustang into the loading dock area of Gates Washer & Manufacturing and close the overhead door without it landing on top of the car. This was due to the fact that large dumpster-type steel garbage containers have always been kept in the loading dock area for the purpose of discarding the sheet metal rolls after the washers have been stamped out of them [Tr. 1065-1070].

The witness has occasion to go to the dock area described by Rodriguez every day, and has never seen any marijuana in that location, nor has she seen it anywhere in the factory in May of 1977 or any other time

[Tr. 1074]. The witness cannot recall ever having given employees a Friday off, other than during the past winter with the bad snowfalls, and if two hundred pounds of marijuana were sitting on the dock any employee in the factory would have seen it. The witness personally makes a tour of the premises at least once a day to check its cleanliness [Tr. 1074, 1075].

RICHARD WEGNER is six feet-eight inches tall, and drives a 1977 Lincoln [Tr. 1085, 1086]. On cross-examination, the witness said that people sometimes call the defendant "Big Rich" because of his size, and he made trips to San Antonio, Texas at her direction. When the garbage dumpers are removed by the scrap metal company, an empty hopper is brought the same day. It has never occurred where an empty hopper was not brought back the same day [Tr. 1093, 1094].

If someone were to have visited Gates Washer & Manufacturing within the last six months prior to trial and looked through the windows, they would not have seen garbage hoppers and would have been able to see the rails that operate the overhead door. They also would have had no way of knowing that this was not the condition of the premises in May of 1977 [Tr. 1104, 1105].

*Lucille Hernandez*

This witness lives in San Antonio, and owns a 1965 Chevrolet which she received from her boyfriend in 1977. When her boyfriend brought her the car, he was with a man named "Richard Wegner." Her boyfriend

brought her the car in the afternoon of a day in March of 1977. On that day she went with RICHARD WEGNER to a notary named Eugene Hernandez, WEGNER signed the title over to her, and he left.

When she applied for a Texas title, she had a problem because her name was not correctly typed on the paper [Tr. 1110, 1111]. This required her to once again execute the transfer of title and have it notarized. Her boyfriend contacted WEGNER, and in October of 1977 WEGNER went with her to the same notary's office. He followed her to the notary's office in his Lincoln automobile [Tr. 1112-1114].

The witness identified one of the signatures on defendant's exhibit WQ as hers. She identified the one beneath hers as that of a notary. The witness was present on the 20th of October, 1977 at the office of Eugene Hernandez, the notary, when RICHARD WEGNER signed the document that was notarized on that day. To the best of the witness' recollection, this event took place between 1:30 and 2:00 in the afternoon of October 20, 1977 [Tr. 1119].

*Eugene V. Hernandez*

The witness lives in San Antonio, Texas, and is a used car dealer and a notary public. He also prepares income tax returns and does bookkeeping. He has been doing this for approximately nine years, and is located at 3501 West Commerce, where he has been since April of 1976 [Tr. 1128-1129]. The witness remembers meeting RICHARD WEGNER in March of 1977. He

seemed to recall that the defendant had more hair on his face, perhaps a beard, and remembers him because ninety-nine per cent (99%) of the people he does business with are Mexican/Americans and he does not normally have a tall Anglo walk into his office. ("It is very rare.") [Tr. 1130]. He does not recall the exact date or time when he met him, however, but the papers he notarized would help him.

After examining defendant's exhibit WQ, he recalls that he met the defendant on two occasions. On October 20, 1977, the defendant and Lucille Hernandez came into his office to transfer a vehicle that had a title from Illinois. The defendant seemed to be in a hurry, and he had him sign the papers so he could leave. While he does not recall the exact time of day this happened, he opens at 10:00 a.m. and closes at 6:00 p.m. and most of his business is done after 12:00, so he believes it was in the afternoon [Tr. 1132, 1133]. The witness recognizes his signature on the document, and definitely notarized it on October 20, 1977, because "I wouldn't put my seal on it unless that was the correct date," [Tr. 1134]. The witness has never been acquainted with RICHARD WEGNER, and never saw him on other than the two occasions on which the defendant came to the witness' office [Tr. 1134].

On cross-examination the witness testified that he does not know Lucille Hernandez' boyfriend, nor does he know Richard Musquiz Silva. He does not recall how much the car was sold for because the tax affidavit is not among the documents in exhibit WQ, and he has no independent recollection [Tr. 1135]. The acknowl-

edgement book which he is required to keep by law was destroyed along with other records, so he does not have it [Tr. 1136]. He lost it when arsonists broke into his office and set fire to it [Tr. 1138].

*Ruth Thompson Foiles*

The witness resides in San Antonio, and has for the last nine years. She is married and has one daughter, and is a real estate sales person for Century Twenty-One, Howard Tate Realty. She has worked there for the past five years, and it is located at 103 Biltmore in San Antonio [Tr. 1139, 1140]. She knows RICHARD WEGNER because she sold him a five-acre parcel in a subdivision. At the time that she sold it to him, he indicated that he wanted to move from Chicago to San Antonio and build a home [Tr. 1141]. WEGNER bought the property on February 12, 1977, and called her several months later to sell it.

In August of 1977, she listed the five acres owned by WEGNER as being for sale [Tr. 1142, 1143]. In October of 1977, she saw WEGNER again when he came into the office to chat with her. He said he had come down to sell a car, and asked if she would go to lunch with him. She recalls that it occurred around 4:30 in the afternoon, but does not recall the specific date. She does recall that he was driving a Lincoln automobile in October of 1977 when he came to see her [Tr. 1145-1147]. She does also recall that he said to her on that date, "I am selling a car and I've got some papers . . . . I had to get papers signed," [Tr. 1147].

She recalls that the reason for the meeting in October of 1977 was because the listing contract was about to run out. The contracts are good for ninety (90) days, and are automatically renewed unless a letter is received from the seller. She recalls that it was getting close to the time when he would have to cancel the listing, and that became a subject of the discussion. She also recalled that November 17, 1977, would have been the date that the listing would lapse if it were cancelled [Tr. 1148].

*Barbara Vidmar*

The witness lives in West Chicago, Illinois, is divorced and has three children, ages twenty, nineteen, and sixteen. She is employed by the Addison Leader Newspaper Corporation, which publishes four separate newspapers. She is both an ad salesperson, and works in the editorial department writing a column known as "Barbara and Business," [Tr. 1155-1157]. She met RICHARD WEGNER at his store in Wooddale at Irving Park Road. The store contains, "unique, very different types of things," and perhaps a thousand different items, all of which were made in Mexico and South America [Tr. 1159-1161].

The witness identified defendant's exhibit WB as a photograph which she took in June or July of 1978 of RICHARD WEGNER in his store (Progressive Design) [Tr. 1164]. The witness testified that there is a substantial Mexican/American population in the Wooddale/Itasca, Addison and Bensonville areas. She also testified that English is taught as a second

language in the pre-school program in that school district, and that she knows many Mexican/American businessmen in the area [Tr. 1170, 1171].

*Daide Diduet*

The witness lives in Laredo, Texas, and is in the import business. She first met RICHARD WEGNER eighteen months ago in the summer of 1977; he came to her shop and bought a lot of things for his business, and he was with a man of Mexican ancestry [Tr. 1173, 1174]. After the first time he came to her store, he would return every three to six weeks, buy more merchandise and ship it back to his store. From time to time he came in a pick-up truck and a trailer, and eight or nine months later he bought a new, larger truck [Tr. 1175, 1176]. He would buy wooden furniture, iron works and ceramics, and all kinds of assorted types of Mexican items [Tr. 1176]. He would occasionally tell her that he had driven straight through from Chicago [Tr. 1177].

On cross-examination, the witness testified that RICHARD WEGNER was one of her biggest customers, but not the biggest (in the sense of the amount of merchandise he bought). The witness requires all of her customers to pay her in cash, and she does not accept checks from anyone [Tr. 1178, 1179]. He would purchase between $2,000 and $3,000 worth of merchandise, and sometimes more. Sometimes merchandise had to be shipped to his store by Allied Van Lines Company [Tr. 1180].

Defendant WEGNER testified in his own behalf that he has been known as "Big Rich" ever since he was in grammar school. He is between six foot-seven to six foot-eight in height, and lives in Itasca, Illinois. He is married, and has one child with his current wife and one from a previous marriage [Tr. 1181-1184].

The first time the defendant came to San Antonio was in the winter of 1974-75. He came to town with a man named Harry Walker, who had friends in San Antonio [Tr. 1198, 1199]. At that time, he was introduced to Saul Sanchez and Richard Silva. He met them at a bar in San Antonio [Tr. 1199, 1200]. In speaking with Silva, he learned that the latter had a body shop and a used car lot. He was informed by Silva that used cars brought a better price in San Antonio than they did in Chicago.

Between 1975 and the time of the trial, he has been in San Antonio twenty times [Tr. 1200, 1201]. He would pass through San Antonio every three or four weeks, once he started making trips to Laredo for his business [Tr. 1202]. He sold four cars to Richard Silva and his friends: a 1971 Lincoln, a 1972 Lincoln, a Jaguar, and a 1965 Chevrolet [Tr. 1204]. When he did not come to San Antonio to sell cars, he would go to the El Mercado, a Mexican-type market located in San Antonio, to get ideas as to how to lay out his store [Tr. 1204]. The defendant said that he met Frank Acosta at Richard Silva's body shop, and that that was the only time or place he had ever met him. He had only small talk with him, and never really conversed about anything [Tr. 1207].

In May of 1977, it was impossible to back a 12- or 14-foot Mustang into the loading dock area of Gates Washer & Manufacturing without having the overhead door hit part of the car if an attempt was made to close the door [Tr. 1212-1215]. The scrap steel container which was located in the dock area, was never missing overnight [Tr. 1216, 1217]. The defendant never received a load of marijuana at the Gates Washer & Manufacturing warehouse on May 5, 1977 from Juventino Rodriguez [Tr. 1217-1218].

The first time he met Juventino Rodriguez was in April of 1978. At that time, he asked Richard Silva if he knew anyone who would drive a truck from Laredo, Texas to his store in Chicago. At that time, Silva recommended Juventino Rodriguez. At that time, he paid Rodriguez $120 to bring a load of wrought iron fixtures from Laredo to Chicago. He had never met Rodriguez until after the truck had already reached an area between fifty and sixty miles from the defendant's house. At that time, he had received a telephone call from Richard Silva indicating that the people who were driving the truck had broken down fifty or sixty miles from WEGNER's house, and were out of gas. Silva described the truck as a green Chevy, three-quarter ton pick-up, with a big, homemade camper, At that time, he had the truck follow him to the gas station at the Joliet area exit. He paid to have the truck filled up, and the truck then proceeded to the store Wooddale where it was unloaded [Tr. 1219-1223].

At this time he had a conversation with Rodriguez, who indicated that he and the person with him were on

their way to Wisconsin to do some fishing. When the merchandise arrived, it was badly damaged [Tr. 1223, 1224]. When the truck was unloaded, the defendant did not smell any marijuana, but did see a mattress and fishing poles in the back of the truck. No marijuana was delivered to his store by Juventino Rodriguez, Jr., and the man with him on April 10, 1978 [Tr. 1225, 1226]. After they unloaded the truck, he invited Rodriguez and his friend to his home to give them something to eat. When they got to the house, it was about 10:30 or 11:00 o'clock, and he offered to make them breakfast. Junior took out a bottle that looked like a beer bottle, and began drinking some orange or yellow liquid that was in it. WEGNER asked what it was, and Rodriguez said it was methadone. He asked him why he had it, and Rodriguez said it was because he was going through withdrawal symptoms for heroin addiction. At that time, he called Richard Silva and told him that he did not want Rodriguez and people like him in his house, and complained about the condition of the wrought iron. He indicated that he and Silva had somewhat of an argument [Tr. 1227-1228].

The next time he saw Rodriguez was on April 28, 1978. He remembers this because it is his birthday (RICHARD WEGNER's), and not because it is Juventino Rodriguez' daughter's birthday. He did not know it was Rodriguez' daughter's birthday until Rodriguez testified to that in open court [Tr. 1228, 1229]. He was in San Antonio on April 28, 1978, on his way to Laredo. He was in town at the time, staying at the La Quinta Motor Inn with his friend, Warren Tratt, who races a jet automobile and was racing at the San Antonio Drag-

way [Tr. 1229-1231]. He arrived on April 27, 1978 [Tr. 1233].

On October 20, 1977, he was in San Antonio because he had sold an automobile earlier that year, and there was a mutilation on the certificate of title that had to be corrected and which required his signature [Tr. 1234, 1235]. He had been told by Richard Silva that something was wrong with the title, and that it required that he come to San Antonio to see the sheriff, or somebody. It turned out that what he had to do was see a notary [Tr. 1235]. On that trip he left Chicago October 18, 1977, and arrived in San Antonio on October 20. He drove a Lincoln automobile down to San Antonio at the time. He came to San Antonio alone, and it took two days to drive. He stayed in Austin, Texas the night before, and arrived in San Antonio approximately 10:00 or 11:00 a.m. on the 20th of October. When he arrived in San Antonio, he called his wife in Itasca from Richard Silva's house. He met with Lucille Hernandez a few hours after arriving in San Antonio, and went with her to the notary [Tr. 1237, 1238]. Eugene Hernandez and Lucille Hernandez were both present when he signed the document contained in defendant's exhibit WQ on October 20, 1977 [Tr. 1238-1240].

After he signed the document, he went to see Ruth Foiles to speak to her about the sale of his property in San Antonio. He believes this took place sometime between 3:00 and 4:00 o'clock on October 20, 1977. When he left her, he took a ride to see his property [Tr. 1240, 1241]. After looking at his property, he went back to

Illinois and arrived there about two days later, or October 22, 1977. The defendant denied each and every specific allegation against him in the indictment [Tr. 1242-1244].

On cross-examination, the defendant testified that he is thirty-eight years old; that in addition to working for Gates Washer & Manufacturing and conducting Progressive Design, he has been an investor in the stock market. The defendant voluntarily produced at that time and tendered to the government records of stock transactions which the government used in cross-examining the defendant [Tr. 1245, 1289]. The defendant was also cross-examined based upon tax returns which he tendered to the government [Tr. 1290-1296]. When he had come to San Antonio, he did not bring either his wife or his child [Tr. 1298].

Of the twenty trips he made to San Antonio, none of them involved the business of Gates Washer, although he should have been doing that. On a few of his visits he just came to observe the El Mercado, but most times he would just stop in San Antonio on his way to or from Laredo [Tr. 1300, 1301].

When he first met Richard Silva, he considered him a friend. He hasn't talked to him since April 28, 1978. At that time, there were a lot of people at Silva's home. He does not know why Richard Silva calls him so frequently, and does not recall actually having spoken with Silva or what they talked about [Tr. 1301-1304]. He does recall that the conversations between he and

Silva which took place about April 9, 1978, related to a shipment of wrought iron which Silva was going to have sent up to him [Tr. 1308, 1309]. During this period, the government used government's exhibits 18 and 33A through E to cross-examine WEGNER [Tr. 1303-1311].

It was not a goal of his life to become National President of Hell's Henchmen Motorcycle Club, but he is currently the national president. It is the responsibility of that office to act as coordinator of the presidents of other chapters.

On redirect examination, the witness testified that he has been involved in the stock market as an investor for over twenty (20) years, and that he carries a margin account [Tr. 1324, 1325]. The defendant is convinced that when Acosta, Romo, and Rodriguez were together (at Uvalde County Jail), they "got together and compared notes and made this story up," [Tr. 1329]. He has never said that the Drug Enforcement agents or the U.S. Attorney instructed the witnesses to do that [Tr. 1329].

On re-cross-examination, the prosecutor asked the defendant if he, "never bought or sold or participated in marijuana transactions?" This question was objected to and the objection was sustained. The prosecutor then asked the defendant if he ever bought, sold, or participated in marijuana transactions during the course of the conspiracy, and the defendant said that he did not. The defendant also said that he did not know that the

people he was meeting in San Antonio were in the business of selling marijuana [Tr. 1330, 1331].

**(3) Rebuttal**

*Juventino Rodriguez* (recalled)

Rodriguez testified in rebuttal that RICHARD WEGNER never kicked him out of WEGNER's house, and that he had been in WEGNER's house twice. He also testified that he lived with Richard Silva for three and one-half years, and that Richard Silva is an uneducated man. He also said that Richard Silva made his living by selling drugs [Tr. 1388-1389]. He denied ever having made a delivery of wrought iron to RICHARD WEGNER in Chicago, he does not go fishing around the country, and he has never gone to Wisconsin fishing [Tr. 1389-1390].

Having been shown defendant's exhibit WR, the witness testified that he was able to pull a car into the dock area at Gates Washer by backing the car in. He also stated that the overhead door closed with the car in the dock area, and that there were no garbage bins in the dock area at that time. He does not remember what kind of a car he was driving at that time [Tr. 1392, 1393]. He does remember that it was green.

*Melvin Schabillion*

The witness testified that he is an agent for the Drug Enforcement Administration. On September 15, 1978, he arrested RICHARD WEGNER in Chicago, Illinois, and read him *Miranda* warnings [Tr. 1394, 1395]. He

said that at that time the defendant asked him what the nature of the offense was that he was being charged with, and the witness told him he didn't know the exact nature as he had not read the indictment, but it involved receiving marijuana from Texas [Tr. 1395]. He said that the defendant said at that time that there must be some mistake because he didn't know anybody in Texas as he had only been in Texas on his way to Mexico to pick up items for his store [Tr. 1396]. Schabillion further stated that when he went to Gates Washer to photograph what is now government's exhibit 30A and 30B, there were no other agents with him and he took the photographs from his car. He has never been inside Gates Washer & Manufacturing Company, and he has never looked inside the windows [Tr. 1397-1398].

On cross-examination he admitted working with Richard Honner, another agent of D.E.A. He also admitted that he has discussed this case with Richard Honner. He knows that Honner spoke with Alice Jorgensen over the telephone, but Honner did not tell him that he went to interview Alice Jorgensen. He does not know that Honner went to interview Alice Jorgensen personally [Tr. 1399, 1400]. He does know that Honner never told him about it, and that he did not go with Honner [Tr. 1401].

*Skip Latson*

Witness testified that his real name is Albert B. Latson, and he is a Special Agent for the Drug Enforcement Administration in San Antonio, Texas. He stated

that he showed government's exhibits 30A and 30B to Juventino Rodriguez at the Uvalde County Jail, and asked him if these were the buildings that he had mentioned earlier. He said that Rodriguez said that they were. He also indicated that he showed government's exhibits 7A and 7B to Rodriguez and Frank Acosta, separately, at the Uvalde County Jail in an interview room. He did not tell them what the photos were before he showed them, and when they were displayed to Rodriguez and Acosta, the latter identified them as the photographs of the home and shop of RICHARD WEGNER [Tr. 1403, 1404].

## SUMMARY OF THE ARGUMENT

The defendant, RICHARD WEGNER, presents two distinct and yet inter-related arguments to this Court as to why his conviction should be reversed and remanded for a new trial. The first of these deals with the basic and fundamental right that a defendant in a criminal case has to confront and cross-examine the evidence and witnesses against him. In the trial of this case, the government offered and the court admitted over the defendant's objection, computer print-outs of telephone records which were later used as the predicate for testimony of other government witnesses and which were heavily relied upon by the government in its summation. The defendant argued that the government failed to lay a proper foundation for the admissability of this evidence under Federal Rules of Evi-

dence 901(a) and 901(b)(9). As a result of this failure the defendant was deprived of an opportunity to meaningfully test the veracity, reliability and probity of this evidence.

In his second argument, the defendant submits that his Constitutional guarantees of due process of law, vis-a-vis a fair trial, were violated as a result of the court's charge to the jury to the extent that it was based upon language in Count X of the indictment, which unfairly and prejudicially permitted the jury to consider evidence not in the record and contrary to what was produced by the government. This deprivation of fundamental due process was exacerbated by improper and prejudicial tactics used by the prosecutor in obtaining testimony, during cross-examination of defendant's witnesses, and in summation.

## ARGUMENT

### I

### The Defendant Was Deprived Of His Right Of Confrontation And Cross-Examination As Guaranteed By The Sixth Amendment To The United States Constitution When The Court Admitted Computer Print-Outs Of Telephone Records Into Evidence.

In its case in chief, the government produced John Connolley as a witness in its behalf. Mr. Connolley

testified that he was employed at the time of trial by Illinois Bell Telephone Company as a security representative in the Chicago, Illinois area [Tr. 82]. He testified that as part of his duties he is "keeper of records," and identified government's exhibits 11 and 12 as "a telephone bill furnished to a subscriber from our company" [Tr. 83]. He stated that government's exhibits 11 and 12 were "made in the regular course of the business," and "kept in the regular course of business of Illinois Bell." He further stated that they were original records, and then proceeded to state that government's exhibit No. 11 indicated that telephone number 733-1270 was subscribed to by Defendant-Appellant RICHARD P. WEGNER (hereinafter referred to as "Defendant WEGNER") [Tr. 83]; that government's exhibit No. 12 was subscribed to by Gates Washer & Manufacturing Company at 9536 West Foster Avenue, Chicago, Illinois; and that government's exhibit No. 11 indicated that Richard P. Wegner was General Manager for Gates Washer & Manufacturing Company [Tr. 84]. Connolley then proceeded to testify as to what the information on the face of government's exhibits 11 and 12 indicated with respect to the nature of the equipment used and the charges for local calls and toll calls [Tr. 84]. He also testified as to how this information should be interpreted by the jury [Tr. 85-86].

Counsel for Defendant WEGNER objected to the admission into evidence of government's exhibits 11 and 12 "with respect to the computers and their operation

and their programming" [Tr. 87], and with respect to the materiality and relevancy of government's exhibit 12. At this juncture, the following occurred:

THE COURT:

All right.

Do you care to respond to that, Mr. Pierce?

MR. PIERCE:

Yes, sir.

With regards to the foundation, Mr. Connolley testified these are the original records and I am sure either through Voir Dire, or I will take Mr. Connolley on Direct and establish the difference between the records. These are not copies. These are the original records, as best as the original records can be produced. These are the result of microfilm, but these are the original records of Illinois Bell. He can explain the difference in the type of paper it is printed on. We went through this in a previous trial.

With regards to materiality and relevancy, the Government will connect this up through the other telephone tolls subscribed to and by Richard Silva and Frank Acosta and where phone numbers were made from those phone calls to the number at Government Exhibit No. 12.

THE COURT:

All right. You establish your further foundation when the jury is brought back in here.

MR. PIERCE:

Fine.

THE COURT:

And I will admit them subject to them being connected up. If they are not connected up as to the telephone number, counsel, you may make a motion to strike.

As the dialogue continued between the Court and the prosecutor, the following occurred:

THE COURT:

Well, suppose then you just go on and establish your foundation and — well, he can have his Cross Examination as to them, each one of them, and I will carry the actual admission in evidence when it is tendered, when the other telephone number is established.

I see no problem really. It just depends on how it is approached. They will come in evidence under the conditic s I have outlined there as to all Defendants, but at the present time they could be admitted for a limited purpose as to this Defendant only, I suppose, but I will carry it. I will just carry it. I won't admit them in evidence now. I will just let you finish your examination. I don't want any post-objections that the proper predicate hasn't been established after I have excused this witness to go back to Illinois. I want to make counsel keenly aware of that because if you are going

to require additional foundation later on, the jury is going to know that you brought the witness back because I intend to afford you the opportunity now of challenging in every way the proper foundation; and if you don't, if you don't urge your objection then and I later find that the witness must be returned, why, you know what you've done.

I don't think a keeper of the records should be jousted around like that. Any fundamental rights will be protected, but the keeper of the records, he can only testify what these records show here, that they are the usual customary records kept in the course of business. No one challenges that I suppose. You don't have to prove good or bad. That's what he has. It goes to the official records. That's all you have, isn't it?

MR. PIERCE:

The Government would prefer to move them into evidence now so that this witness can be excused.

THE COURT:

All right. All right. Well, I want to give counsel his opportunity to Cross Examine the witness further in regard to the computer layout. I want him to have his day in Court even though it may just minutely drag out the trial on all these things, but I will give him his day in Court. I will give you your day in Court. Everybody gets their day in Court, but I will

point out to you gentlemen that authenticity is a matter that good lawyers can stipulate to and save time for everyone, even saving this man coming down here, as far as that goes. It could have been done. It's usually done in my trials, but if you want to, you have a right to have it done the hard way.

Bring the jury in, please.

[Tr. p. 90, li. 8 to p. 91, li. 12]

When the jury was returned to the courtroom, the prosecutor proceeded to establish through the witness what the Illinois Bell computers register on magnetic tape each time a telephone call is made, and that during the period of time of the billing involved in government's exhibits 11 and 12, the computer system was changed [Tr. 93-94]. The government then passed the witness for cross-examination.

Counsel for Defendant WEGNER established during cross-examination of the witness that the witness himself neither developed the print-outs from the computer that was being offered as government's exhibits 11 and 12, nor did he personally initiate the request for the print-outs, nor was he present when the request was initiated and did not know what was requested [Tr. 100-101]. During the cross-examination, the following took place:

Q Now, you say that the reason that these are on different kinds of paper is that you

changed computer systems. Could you tell us what the first system was?

A The blue copies that you have there?

Q I don't mean what paper was produced by it, sir. Could you explain the nature of the process?

A The type of the automatic message accounting system?

Q Yes, sir. Who manufactured it, sir?

A The computer system?

Q Yes, sir.

A I don't know, sir.

Q Who programs it, sir?

A Our telephone company controllers department.

Q You have spoken with the programmer?

A That might be 100 people, sir.

Q I see.

Would it be fair to say that the Government Exhibit 11 and Government Exhibit 12 reached this Courtroom today as a result of someone other than yourself making what you believed to have been a request of another person making what you believed to be a request of a computer to print out what you believed to be the original on the microfilm?

A I couldn't agree with your word "believe," sir. All the rest I would agree to.

Q I am sorry, sir. I didn't hear you.

A I don't agree with your belief. I do not believe, but I do agree how the copies were obtained.

MR. GENTILE:
I have nothing further.

MR. GARCIA:
I have no questions on behalf of Mr. Cruz.

MR. GENTILE:
I stand on my earlier statement to the Court.

[Tr., p. 101, li. 24 through p. 103, li. 9.]

The Court admitted government's exhibits 11 and 12 into evidence [Tr. 103]. At this point, defense counsel objected under Federal Rule of Evidence 901-A that the exhibits were not properly authenticated, and further called the Court's attention to F.R.E. 901-b(9).

Assuming that the prosecutor overwhelmingly established that government's exhibits 11 and 12 were business records of Illinois Bell Telephone Company, computer data derives reliability as evidence only from the system by which it is produced. If the original data fed in is not accurate, or if the machine and its program are not well designed and operated, or if the data produced is not properly evaluated, such data has no reliable probitive force. The person who provides the foundation for the admission of electronically produced data must be familiar with the operation of the equipment used, and should describe the computer's operations with enough detail to support a finding that the result is accurate and reliable. 5 Weinstein, *Evidence*, paragraph 901(d)(9)(02), page 901-109. This objection

could not have been more clearly raised, as is reflected in the report of proceedings at page 87, where the following occurred:

> THE COURT:
>
> All right, do you say the proper predicate has not been laid?
>
> MR. GENTILE:
>
> With respect to the computers and their operation and their programming.

Thus, the issue as presented to this Court is not whether government's exhibits 11 and 12 were the records of Illinois Bell, but whether the government met the requirements of Federal Rule of Evidence 901-A as outlined in Rule 901(b)(9), which dictatse that when a computer "process or system" is relied upon to establish the accuracy of the assertion which makes its proffer relevant, then the proponent must produce "evidence describing a process or system used to produce a result and showing that the process or system produced an accurate result." F.R.E. 901(b)(9). To fail to do so is to ignore the concept of meaningful confrontation and cross-examination.

There is a glowing absence of any understanding of or compliance with Federal Rule of Evidence 901 on the part of the prosecutor in this case; this in spite of a clear, concise, and direct objection setting forth not only the grounds for the objection but also the specific rule involved. Therefore, this case comes before this

Court in a posture far different from *United States v. Fendley*, 522 F.2d 181 (5th Cir. 1975), as the record in that case was interpreted by the majority. Therefore, this Circuit must come to grips with the question of whether it will establish a policy of dispensing with the requirements of F.R.E. 901 when "computer evidence" is being proffered by the government in a criminal case. Stated differently, the question becomes one of whether the government witness who is being relied upon to lay the proper predicate for the admission of "computer evidence" must be able to be cross-examined with respect to knowledge of the computer program that produced the evidence, and whether the defendant's Sixth Amendment right to counsel, confrontation and cross-examination of witnesses, and his rights to due process and a fair trial include the right to have the government bear the burden of establishing that computers which were used to produce the "business records" were functioning properly.

In *United States v. Russo*, 480 F.2d 1228 (6th Cir. 1973), the Court of Appeals for the Sixth Circuit stated:

> [N]o court could fail to notice the extent to which businesses today depend on computers for a myriad of functions. Perhaps the greatest utility of a computer in the business world is the ability to store large quantities of information which may be quickly retrieved on a selective basis. Assuming that properly functioning computer equipment is used, once the

> reliability and trustworthiness of the information put into the computer has been established, the computer print-outs should be received as evidence of the transactions covered by the input. 480 F.2d 1228, at 1239-40.

The Court, in *Russo*, admitted into evidence the computer print-out that was in question, but there the government introduced evidence underlying and verifying the reliability of the output of the computer. The Court noted that the procedures for testing the accuracy and the reliability of the information fed into the computer were detailed at great length by the witness proffered by the government. In fact, the government produced the vice president of Blue Shield of Michigan in charge of all computer functions to describe the computer equipment used by the employer, and the computer's particular functions in the claims processing procedures. He described the verification which takes place of the input to the computer; he stated that new programs are pre-tested before adoption for use in the computers; and he generally went on to testify with direct knowledge susceptible of cross-examination with respect to "describing a process or system used to produce a result, and showing that the process or system produced an accurate result." *United States v. Russo, supra*, at pp. 1233-1234, 1240-1241. See, F.R.E. 901-A.

In *United States v. Scholle*, 553 F.2d 1109 (8th Cir. 1977), the Court of Appeals for the Eighth Circuit, citing *United States v. Fendley*, stated:

> Even where the procedure and motive for keeping business records provide a check on their trustworthiness, the complex nature of computer storage calls for a more comprehensive foundation. Assuming properly functioning equipment is used, there must be not only a showing that the requirements of the business records act have been satisfied, *but in addition the original source of the computer program must be delineated, and the procedures for input control including tests used to assure accuracy and reliability must be presented* [citations omitted]. 533 F.2d 1109, 1125 (emphasis added).

The Court in *Scholle* admitted into evidence a computer print-out reflecting drug analysis computerized routinely during the regular course of business at the Drug Enforcement Administration. However, the witness through which this evidence was introduced was the founder of the program, and was in a position to testify about the system. Noting that the government "presented very little evidence concerning the mechanics of how input from eight widely disbursed laboratories is controlled or tested for its accuracy and reliability," the Court held that on the facts of this case there was sufficient "proof of its trustworthiness as well as an adequate opportunity for rebuttal." 553 F.2d 1109, 1125. In light of the fact that John Connolley in the instant case had no knowledge whatsoever with respect to the computer programming and testing for its accuracy, Defendant WEGNER was in no way able to confront, cross-examine, or rebut his testimony.

Therefore, the test established and adhered to by the Eighth Circuit in *Scholle* was not met in the case before this Court.

In *United States v. DeGeorgia*, 420 F.2d 889 (9th Cir. 1969), the Ninth Circuit Court of Appeals established a test which antedated, but recognized, what were then proposed Federal Rules of Evidence as they related to the introduction of "business records" that were in the form of "computer evidence." In that case, the court stated:

> While, . . . it is immaterial that the business record is maintained in a computer rather than in company books, this is on the assumption that: (1) The opposing party is given the same opportunity to inquire into the accuracy of written business records, and (2) The trial court, as in the case of challenged business records, requires the party offering the computer information to provide a foundation therefor sufficient toward a finding that such information is trustworthy. 420 F.2d 889, 893, fn. 11.

In *DeGeorgia*, the government carried the day with respect to providing the defendant a full opportunity upon cross-examination to inquire into the company practice of feeding information as to all car rentals and leases into the computer, and as to the accuracy of the computer in retaining and retrieving such information. The government presented foundation evidence

as to input procedures used. While the Ninth Circuit did not decide the issue as to whether the government should have produced expert testimony as to the mechanical accuracy of the computer, it reserved this foundation question, as this Circuit did in *Fendley*, because the defendant did not raise this question in the trial court. 420 F.2d 889, 893, fn. 11, ¶ 2.

It is important to note that in *United States v. Fendley, supra*, this Court cited *DeGeorgia* as authority, and in neither case did defense counsel specifically raise the issue now before this Court when the case was still at the trial level.

The right of Defendant WEGNER to confront and cross-examine and challenge the credibility and reliability of the "computer witness" has never been decided by this Circuit or the United States Supreme Court, but has been clearly decided in *United States v. Liebert*, 519 F.2d 542 (3rd Cir. 1975). There, the Court stated:

> Included within the constitutional right of confrontation is the ability to cross-examination to challenge the credibility and reliability of the witnesses testifying against a defendant. . . . A major 'witness' confronting Liebert will be computer print-outs indicating that the IRS has no record of having received his returns. . . . The introduction of a computer print-out is admissable in a criminal trial provided that the party offering the com-

> puter information lays a foundation sufficient to warrant a finding that such information is trustworthy and the opposing party is given the same opportunity to inquire into the accuracy of the computer and its input procedures as he has to inquire into the accuracy of written business records [citations omitted]. 519 F.2d 542, 547.

In *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978), the Court of Appeals for the Seventh Circuit permitted introduction of "computer evidence" through the testimony of a Veterans Administration supervisory employee who was familiar with the preparation and use of the print-outs where the government showed to the satisfaction of the trial court (1) what the input procedures were, (2) that the input procedures and print-outs were accurate within two (2) per cent, (3) that the computer was tested for internal programming errors on a monthly basis, and (4) that the print-outs were made, maintained, and relied upon by the V.A. in the ordinary course of its business activities. The Court found that the defense in that case had an adequate opportunity to inquire into the accuracy of the input procedures and programming used as a result of the nature of the witness proffered by the government. 581 F.2d 595, 598.

In *United States v. Fendley, supra*, this Court relied upon *United States v. Miller*, 500 F.2d 751 (5th Cir. 1974), combined with an improperly interposed objection by defense counsel for affirming the conviction of Fendley

over his objection that the "computer evidence" should not have been admitted. There is a dispute between the majority and Justice Godbold's dissent as to whether the *Miller* tests had been met. Defendant WEGNER submits to this Court that they were clearly not met by the government in the case *sub judice*. John Connolley made no reference to any procedure, routine or otherwise, designed to assure the accuracy of these records. While he did testify that the purpose for making the records was so that billing could take place, this Court could take judicial notice that telephone bills are not always accurate. And, finally, there is nothing in the record to indicate whether the calls "declared" by the "computer evidence" were mere accumulations of hearsay or uninformed opinions.

Furthermore, the introduction of government's exhibits 11 and 12 into evidence in this case permitted the prosecutor to introduce "summary evidence" of what was portrayed therein through Special Agent John Wolkin, D.E.A., [Tr. 756-778], and charts prepared by him from the records indicating the number of calls made and their correlation to calls made from other telephones (government exhibits 18 and 33A-E) [Tr. 778]. It also permitted the government to cross-examine the defendant [Tr. 1303, *et seq.*] as to the exhibits, and to argue in summation, in the face of an alibi proffered by the defendant which was strong of its own right (see Argument II, *infra*), that the defendant would not have any legitimate reason for calling his alleged co-conspirator, Richard Silva [Tr. 1478]. These records were also used to corroborate the testimony of

the accomplice witnesses, which testimony was directly contradicted by both the defendant and other witnesses called on his behalf and was vigorously argued by the prosecutor in summation [Tr. 1552-54, 1563, 1575, 1581]. Therefore, the defendant was substantially prejudiced by the admission of the "computer evidence," and was deprived of basic constitutional rights designed to ensure a fair trial.

## II.

### The Defendant Is Being Deprived Of His Liberty Without Due Process Of Law, As Guaranteed By The Fifth Amendment To The United States Constitution, As A Result Of Having Been Denied A Fair Trial.

Incidents occurring during the proceedings in the court below have combined to deprive RICHARD WEGNER of fundamental fairness and due process of law in the trial of this case. In *Rochin v. California*, 342 U.S. 165, 97 L.Ed. 183, 72 Sup.Ct.Rep. 205 (1952), the Supreme Court stated:

> Regard for the requirements of the due process clause 'inescapably imposes on this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express notions of justice of English-speaking peoples even toward those charged

with the most heinous offenses.' (Citations omitted.) 342 U.S. 165, 169.

It is submitted that if this Honorable Court scrutinizes the entire proceedings in the trial court, it will find that Defendant RICHARD WEGNER was not given a fair trial primarily because the use of "on or about" in Count X of the indictment permitted the prosecutor to have unfair advantage in debilitating RICHARD WEGNER's defense as to its strongest point, i.e., alibi. The prosecutor's entire case rested upon the testimony of three witnesses who were accomplices with strong motivation for testifying falsely. The only event common to the testimony of the accomplices was the one involved in Count X. Had the defendant been afforded the proper opportunity to hold the government to its proof vis-a-vis the date of the occurrence, the strength of the alibi defense as to that Count would have resulted in acquittal on all Counts. However, because the Court permitted the jury to consider other dates, *not* in evidence as to the date of the Count X occurrence, the prosecutor was given unfair advantage. To this extent, the defendant was so prejudiced by the inclusion of the words "on or about" in Count X that it mandates a reversal and new trial.

This Court will also see that the prosecutor used improper and prejudicial tactics in obtaining testimony, cross-examination and summation, which were designed to prejudice the defendant and inflame the jury. This fact alone, without the others even being considered, is enough to require reversal and a new trial.

## A. The Indictment

We commence by making it clear to this Court that the defendant is not complaining of a variance between the indictment and the proof as that term is used in Federal Rule of Criminal Procedure 7. The elements of the crime charged in Count X were not different from the elements proven by the government at the trial if the evidence is viewed most favorably to the prosecution. Furthermore, the defendant does not believe, and is not urging this Court, that a double jeopardy problem would arise as a result of the verdict in light of Count X of the indictment. See, *Berger v. United States*, 295 U.S. 78 (1935); *Kotteakos v. United States*, 328 U.S. 750 (1946). The question of prejudice to the defendant is grounded in due process of law and deprivation of a fair trial.

The rationale for permitting "on or about" language to be used in an indictment differs from that underlying the use of such language in a charge to a jury. Where an indictment is concerned, if a grand jury has heard no evidence as to a specific date, it may use the phrase "on or about" to indicate its unwillingness to pinpoint the date of the offense charged. It has been held that under those circumstances, the phrase may be used without vitiating the indictment *per se* or elevating a minor grievance to reversible error. *United States v. Somers*, 496 F.2d 723 (3rd Cir. 1974); *Russell v. United States*, 429 F.2d 237 (5th Cir. 1970); *United States v. Duran*, 411 F.2d 275 (5th Cir. 1969). However, this Court has recognized that the date alleged in an indictment can be

used as a deliberate strategem by the government, and without deciding the point, has indicated that under such circumstances an exception to the general rule may exist. *United States v. Owens*, 431 F.2d 349 (5th Cir. 1970). This Circuit has also recognized that deviations between the indictment and proof adduced at trial can be prejudicial to a defendant, even where the indictment is drafted in general terms. *United States v. Malatesta*, 583 F.2d 748 (5th Cir. 1978).

In *United States v. Arteaga-Limones*, 529 F.2d 1183 (5th Cir. 1976), this Court was confronted with an indictment which contained the "on or about" language complained of herein and, in addition thereto, indicated that "the exact date [of the occurrence] was unknown to the grand jurors." 529 F.2d at 1192. From the outset, the primary government witness acknowledged that he was unable to recall the exact dates during which the charged drug offenses occurred, and testified at the trial that he did not remember the exact dates. The Court held that the government need not prove the exact date of a drug offense with precision so long as it clearly established that the offenses occurred before the return of the indictment and within the statute of limitations, relying on *Russell v. United States, supra.* However, *Arteaga-Limones* prayed that because his defense was that of alibi and it was dependent upon a showing that he was nowhere near the place where the offense occurred on the dates alleged, he was prejudiced by the government's failure to prove the exact dates of the offenses charged. This Court found, however, that *Arteaga-Limones* did not rely upon an alibi, and

in fact relied upon the government witnesses' failure of memory as to the date to support the contention that the witnesses' account of the criminal transactions were fabricated and calculated to secure leniency at the future sentencing procedure of that witness. 529 F.2d at 1193-1194.

The case *sub judice* comes before this Court with a different posture from *Arteaga-Limones.* Throughout his cross-examination of accomplice-witnesses Acosta, Romo, and Rodriguez, counsel for the defendant repeatedly was successful in establishing that October 20th was the date upon which they allegedly distributed marijuana to someone in the Chicago area, whom they identified as Defendant RICHARD WEGNER [Tr. 632, 635, 715-16]. He also established on cross-examination that the person they delivered to as charged by Count X was the same person that they delivered to on the other occasions recited in their testimony.

At the Instructions Conference, counsel for Defendant WEGNER objected to a government proposal to modify the language of the defendant's proffered "contention" instruction, and further moved the Court to strike from the indictment and the charge to the jury the use of the phrase "on or about" and its implications, calling to the Court's attention that it gave the government the "best of both worlds" with respect to being able to avoid its own proof and still be successful in obtaining a conviction. The Court overruled the objection and denied the motions [Tr. 1437-1444].

During his summation, counsel for Defendant WEGNER never waivered from his attack upon the credibility of the three accomplices based upon their bias, motive for testifying falsely, prior criminal records, etc., *coupled with and given emphasis by the proof of an alibi which clearly showed that the accomplices were lying as to Count X* [Tr. 1503-1506, 1517, 1518, 1520, 1523, 1525], and therefore *in toto*.

In its charge to the jury, the Court emphasized reliance upon the language of the indictment [Tr. 1585], and the fact that the government need not prove a specific date when the indictment reads "on or about" [Tr. 1607, 1608]. The prosecutor seized upon this in summation [Tr. 1450, 1473]. The Court further erred by charging the jury that the alibi defense of Defendant WEGNER was only to Count X [Tr. 1629, 1630]. This is particularly unfair and prejudicial to the defendant in this case, where if the jury believed that Count X was not proven because the accomplices had lied, it should also have been permitted to apply the conclusion as to their credibility to the remaining accounts of the indictment involving Defendant RICHARD WEGNER.

Allowing a defendant to be charged and prosecuted pursuant to an indictment which permits the prosecutor to avoid being bound by his proof, and which permits the theory of the prosecution to be amorphous, runs afoul of the concept of fair trial. If allowed to stand here, it will spread. No principle of procedural due process is more clearly established than the notice of

the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. *Cole v. Arkansas*, 333 U.S. 196, 92 L.Ed. 634 (1948); *Ungar v. Sarafite*, 373 U.S. 575, 11 L.Ed.2d 921 (1964); *United States v. Garner*, 581 F.2d 481 (5th Cir. 1978). As Justice Douglas so aptly put it in his dissent in *Jay v. Boyd*, 351 U.S. 345, 100 L.Ed. 1242, 76 Sup.Ct. 919 (1956):

> Fairness, implicit in our notions of due process, requires that any 'hearing' be full and open with an opportunity to know the charge and the accusers, to reply to the charge, and to meet the accusers. 351 U.S. 345, 375.

Such fundamental notions of fairness are an integral part of the American way of life, and always have been. Even in times of relative lawlessness, such as during that period of American history when the Western frontier was being settled, this notion of being given an opportunity to meet accusatory allegations head on was considered one of the great benefits of being in America. Our Supreme Court, through a dissent by Justice Frankfurter, acknowledged this in citing the code of Wild Bill Hickock, by which he conducted his affairs in Abilene, Kansas:

> . . . . [M]eet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citi-

> zenry. If you met him face to face and took the same risks he did, you could get away with almost anything, as long as the bullet was in the front. *Jay v. Boyd, supra,* at 373.

In *United States v. Prejean,* 494 F.2d 495 (5th Cir. 1974), this Court recognized the need to prevent amorphous indictments and prosecutions from taking place, and held that "neither the prosecution nor the trial judge can alter the charge to fit the proof; to do so would be usurping the function of the grand jury." 494 F.2d at 497.

The essence of alibi is the impossibility of the defendant's guilt based on his physical absence from the locus of the crime. *Roper v. United States,* 403 F.2d 796, 798 (5th Cir. 1968). Evidence of alibi should come into a case like any other evidence, and must be submitted to the jury for consideration of whether the evidence as a whole on the issue of presence proves the defendant's guilt beyond a reasonable doubt. *Smith v. Smith,* 454 F.2d 572, 578 (5th Cir. 1971). Logically, an alibi is not an exculpatory defense; it is merely a method of disproving the prosecution's case. *United States ex rel. Waters v. Bensinger,* 507 F.2d 103, 105 (7th Cir. 1974). A defense of alibi properly shows that the defendant could not have committed the crime because he was elsewhere *at the time of the offense. United States v. Beaver,* 524 F.2d 963, 966 (5th Cir. 1975).

Whenever the evidence proffered by the government on the issue of the date and time of the offense is

clear and uncontradicted, the defense of alibi is not only proper but is in fact the strongest that can be offered where it is corroborated by disinterested witnesses, as it was in the case *sub judice*. To permit the government an escape valve simply because the words "on or about" were used in the indictment, deprives the defendant in such a case of a fair means for presenting the strongest and most convincing defense that can be interposed. Therefore, in light of the facts of the case before this Court, a reversal and remand for new trial is in order.

**B. The Prosecutor's Misconduct**

As this Court has recently stated in *United States v. Bourg*, 598 F.2d 445 (5th Cir. 1979):

> "It should be unnecessary to say again that in a criminal prosecution a United States attorney has a double burden: he has the obligation to prosecute the government's case zealously and the obligation to try the case fairly and with due regard for the rights of the persons accused. *Berger v. United States*, 295 U.S. 76, 78;" 598 F.2d at 450.

In the case before this Court, the prosecutor did not conduct himself within the framework of this standard. Even assuming that the drafting of the indictment and the use of the words "on or about" were done in good faith, the prosecutor's conduct in knowingly de-

parting from the evidence in the record during summation and using tactics calculated to inflame and stimulate passion in the jury, warrant reversal if anything more than lip service is to be paid to the concept of a fair trial and due process of law as applied to this case.

Defendant RICHARD WEGNER testified in his own behalf at the trial of this case [Tr. 1181-1331]. During his direct and re-direct examinations, the defendant never waivered from denying involvement in the transactions alleged in the indictment, and his testimony closely followed the dates and occurrences in the indictment. No general denial of involvement in drug trafficking was ever brought up by the defendant during direct and re-direct examinations. The prosecutor conducted his recross-examination as follows:

QUESTIONS BY MR. PIERCE:

Q Last question, Mr. Wegner.

You are telling us then that you have never bought or sold or participated in marijuana transactions?

MR. GENTILE:

Objection. The indictment covers specific dates, Your Honor. I don't know what the answer to this is, but he's got a limited right.

THE COURT:

All right, sustained.

MR. GENTILE:

Thank you.

If you will make a specific date he will answer the question.

Q During the course of this conspiracy, Mr. Wegner, then it is your testimony you have never bought, sold or participated in marijuana transactions?

A No, sir.

Q You do not associate with such people who do?

A I in all truthfulness can't answer that because I thought I associated with people that did not. All of a sudden I saw a man here that said he did, and I didn't know it.

MR. PIERCE:

Thank you.

THE COURT:

Thank you. You may step down.

This Circuit has recently held in *United States v. Havens*, 592 F.2d 848 (5th Cir. 1979), that the door may not be opened by the prosecutor on cross-examination for the purposes of introducing rebuttal evidence which was illegally seized. The defendant must lay the predicate for such introduction during his direct or re-direct examination. While it is true that illegally seized evidence was not introduced in rebuttal against Defendant RICHARD WEGNER, and it is also true that the prosecutor's attempt to show RICHARD WEGNER's involvement in extraneous offenses were not permitted by the trial judge [Tr. 1331-1369], the prosecutor's conduct in putting such a question to Defendant WEG-

NER in the presence of the jury, and requiring the objection to be made at all, caused immeasurable prejudice to Defendant WEGNER in this case. Such conduct has repeatedly been condemned by this Circuit. See, *Jackson v. United States*, 311 F.2d 686 (5th Cir. 1963); *United States v. Gonzalez*, 491 F.2d 1202 (5th Cir. 1974).

In his summation, the government lawyer making preoration almost immediately seized upon the benefits that were to enure to the prosecution by the "on or about" language in instructions stating to the jury that the prosecution did not need to prove the exact date of any Count, notwithstanding the fact that the October 20, 1977, date was proven without variation in the record [Tr. 1450].

The prosecutor, making the closing part of the summation, continued and exacerbated the inflammation of the jury. Within the first minute of his argument, he stated:

> And, last, quite honestly, I am going to make a plea for law enforcement because that is one word that has not become a dirty word in the San Antonio community yet. Transcript, p. 1547.

The prosecutor continued in his summation to attack the alibi defense proffered by Defendant WEGNER by calling upon the jury to make inferences from the record that were totally impermissible and not substantiated by any evidence whatsoever [Tr. 1570, 1571]. He

continued to urge the jury to require the production of evidence by the defendant, and to shift the burden of proof, both with respect to persuasion and production [Tr. 1570, li. 10-12].

Throughout his summation, the prosecutor repeatedly used the word "we" when speaking of the actions of the D.E.A. agents in the investigation of the case. Such a use of language can only be interpreted by a jury as testimonial in nature, and it was clearly wrong and unethical for the prosecutor to utilize this type of an argument.

Finally, in urging his "plea for law enforcement" to the jury the prosecutor stated:

> I want to walk up to you and shake you by the shoulders and say, 'Can't you see, can't you see what's going on here?' Transcript, page 1579, li. 8-10.

In *Dunn v. United States*, 307 F.2d 883 (5th Cir. 1962), this Court recognized that where a prosecutor utilizes tactics and techniques which are akin to testifying, zeal outruns fairness. Here, where the prosecutor knowingly asked an impermissible question with respect to Defendant WEGNER's general history of involvement in illegal activities related to marijuana, the prosecutor intentionally created the need for an objection which he knew would be forthcoming and would be prejudicial to the defendant simply because it was made at all. Such conduct was wholly unwarranted,

and could not be cured by any instruction. In light of the fact that in both peroration and summation, the prosecutor urged interpretations of facts which would be given credence only if the jury believed that the prosecutor had information which was not permitted to be before them, such conduct on the part of the prosecutor requires reversal even without additional misconduct.

This Court has reversed other cases for the same type of conduct, even where it was "instigated by defense tactics," a condition not present in the case *sub judice*. *Dugan Drug Stores, Inc. v. United States*, 326 F.2d 835 (5th Cir. 1964). The summation by the prosecutor in this case was clearly "undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." *Berger v. United States*, 295 U.S. 78, 85, 79 L.Ed. 1314 (1935). Here the prosecutor clearly violated the American Bar Association's standards for the administration of criminal justice, the prosecution function, §5.8(a) through (d). He also did untold damage to the defendant as a result. See, *United States v. Corona*, 511 F.2d 1386 (5th Cir. 1977).

Finally, the prosecutor utilized a tactic to obtain the cooperation and testimony of Frank Acosta that has probably never been used before, and certainly should not have been permitted by the trial judge. Frank Acosta was sentenced on August 30, 1978, to a period of forty-five (45) years' incarceration (fifteen years on each of three counts to run consecutive to each other). Ninety-one days thereafter, on November 29, 1978, a

Motion for Reduction of Sentence filed under Rule 35 of the Federal Rules of Criminal Procedure was filed on Acosta's behalf by his attorney. On December 6, 1978 (or the ninety-ninth day of the Rule 35 period), the prosecutor filed a response to this motion, asking that no ruling take place until after the trial of the case *sub judice*. [Both of these documents are set out in the appendix to this brief.] *No ruling under the Rule 35 motion had taken place as of the date of Acosta's testimony, i.e., March 21, 1979, more than two hundred days after he had been sentenced, and more than eighty days after the period established by Rule 35.*

In *United States v. Mendoza*, 565 F.2d 1285 (5th Cir. 1978), an Opinion of this Court interpreted Rule 35 to permit a ruling on a motion for reduction of sentence beyond the one hundred twenty (120) day period, where a strict adherence to the one hundred twenty day time limitation would result in an injustice, and where it was necessary to effectuate the overall purposes of Rule 35. This Opinion and its rationale were adopted as to all aspects relevant to the case *sub judice* by this Circuit *en banc* in *United States v. Mendoza*, 581 F.2d 89 (5th Cir. 1978). There can be no question that this Circuit never contemplated that such an interpretation of the one hundred twenty day time limitation prescribed in Rule 35 as was applied by the prosecutor and the sentencing judge in this case should ever take place. Such a manipulation of Rule 35 as took place here can only result in prosecutors using Rule 35 as a means of strongarming testimony from witnesses such as Frank Acosta.

Such a tactic is rank misconduct and highly unethical, and this Court should not place its imprimatur on such conduct by the prosecutor. The only way of avoiding this type of conduct in the future is to immediately recognize it as violative of due process and reversible error *per se*.

## CONCLUSION

RICHARD D. WEGNER respectfully prays this Honorable Court to vacate the judgment of conviction and sentence, and to remand this case to the District Court with an Order granting him a new trial.

Respectfully submitted,

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701/382-7755

Attorney for Defendant-
Appellant

## CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the following defendant-appellant's brief upon the following, postage prepaid:

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Assistant U.S. Attorney
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This ____ day of January, 1980.

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# APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

versus No. SA-78-CR-122

FRANK ACOSTA, ET AL,
Defendant.

Filed: Nov. 29, 1978

## MOTION FOR REDUCTION OF SENTENCE FILED UNDER RULE 35 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes FRANK ACOSTA, Defendant in the above numbered and entitled cause, represented by his attorney of record, ABRAHAM D. RIBAK, and files this his Motion for Reduction of Sentence Under Rule 35 of the Federal Rules of Criminal Procedure and in support thereof would show unto the Court the following:

I

That on the 30th day of August, 1978, Defendant appeared with his counsel for sentencing after Defendant had plead guilty to Counts 1, 2 and 3 of the indictment pending in the above cause at a re-arraignment on July 17, 1978. The Court found the Defendant guilty and accepted his pleas of guilty of the following offenses as set out in the indictment in the above numbered and entitled cause, to-wit:

> Unlawfully, wilfully and knowingly combining, conspiring & confederating & agreeing together & with others to possess heroin, a Schedule I Narcotic Drug Controlled substance, with intent to distribute the same contrary to Title 21, U.S. Code, Sec. 841(a)(1) & in vio. of Title 21, U.S. Code, Sec. 846, beginning on or before April 11, 1978 & continuing until April 27, 1978, in the West. District of Tex. & divers other places to the Grand Jurors unknown in Count 1 of the Indictment, possessing with intent to distribute heroin, in vio. of Title 21, U.S. Code, Sec. 841(a)(1) in County 2, unlawfully possessing with intent to distribute heroin in vio. of 21, U.S. Code, Sec. 841(a)(1) in Count 3 of Indictment.

II

The Court entered the following sentence and sentenced the Defendant to be committed to the custody of the attorney general or his authorized representa-

tive for a period of fifteen (15) years on Count 1 of the Indictment, to be followed by a special parole term for the remainder of his life. On Count 2 of the Indictment, the Defendant was sentenced to fifteen (15) years to also be followed by a special parole term for the remainder of his life. Further, the sentence on Count 2 is to run consecutively to the sentence on Count 1. On Count 3 of the Indictment, the Defendant was committed to the custody of the attorney general for a period of fifteen (15) years to be followed by a special parole term for the remainder of his life. The sentence on Count 3 is to run consecutively to the sentence on Count 2. The total sentence is for forty-five (45) years to be followed by a special parole term for the remainder of his life.

III

That since the date of sentencing, Defendant has been held in a county jail outside of Bexar County for his own protection. That during this period of time, Defendant has cooperated with agents of the Drug Enforcement Administration and the Assistant U.S. Attorneys in the investigation and prosecution of various criminal defendants, all to the benefit of the U.S. Attorney, the Drug Enforcement Administration and the welfare of the general public. That his services in behalf of the Government have been invaluable, of great personal risk and harmful to the Defendant and have been carried out in the spirit of cooperation to aid the Government in an effort to cut down on the narcotics traffic.

IV

That the U.S. Attorney for the Western District of Texas along with the agents of the Drug Enforcement Administration will not oppose this Motion for Reduction of Sentence and will strongly support and join in in this request to the Court for reduction of Defendant's sentence. That although the U.S. Attorney and the Drug Enforcement Administration will not make a specific recommendation as to the amount of reduction, it is this Defendant's position supported by the Motion of his attorney of record that his sentence be reduced to a period of four (4) years confinement, this being the type of sentence to which the U.S. Attorney had previously agreed to in previous plea bargaining discussions and agreements prior to Defendant entering his plea of guilty and which sentence would have normally arisen out of Defendant's plea to a criminal information charging him with violation of 21, U.S.C. Section 843(b) — use of communication device to facilitate the commission of a felony which plea bargaining agreement would have resulted in dismissal of the indictment in the above cause.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays that the Court set his Motion for Reduction of Sentence Under Rule 35 of the Federal Rules of Criminal Procedure and that upon said hearing that said Motion be granted.

Respectfully submitted,

LAW OFFICES OF
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/s/ ABRAHAM D. RIBAK
ABRAHAM D. RIBAK
Attorney for Defendant

[Certificate of Service omitted in printing]

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Number and Title Omitted)

Filed: Dec. 6, 1978

## GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR REDUCTION OF SENTENCE

Comes now the United States by and through the United States Attorney for the Western District of Texas and in response to Defendant's Motion for Reduction of Sentence would respectfully show the Court as follows:

On August 30, 1978, Defendant was sentenced to 45 years imprisonment after pleading guilty to a three count indictment. Since that time, the Defendant has debriefed and agreed to testify for the Government in the case of United States v. Silva, SA-78-CR-238. This case is presently scheduled for trial in Judge Suttle's Court on January 15, 1978 [sic]. The Government would be in a better position to comment on the extent of Defendant's cooperation after he has testified in that case.

Wherefore, premises considered, the Government prays that the Court carry the motion of Defendant for reduction of sentence until the conclusion of the trial in United States v. Silva, *supra*.

Respectfully submitted,

JAMIE C. BOYD
United States Attorney

/s/ ARCHIE CARL PIERCE
Archie Carl Pierce
Assistant United States
Attorney

[Certificate of Service omitted in printing]

# 79-5262

## United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 79-5262

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD WEGNER,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas, San Antonio Division

# REPLY BRIEF FOR DEFENDANT-APPELLANT WEGNER

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 79-5262

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD WEGNER,
Defendant-Appellant.

---

Appeal from the United States District Court for the
Western District of Texas, San Antonio Division

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# REPLY BRIEF FOR DEFENDANT-APPELLANT WEGNER

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## ARGUMENT

### I

**The Defendant was Deprived of His Right of Confrontation and Cross-Examination as Guaranteed by the Sixth Amendment to the United States Constitution when the Court**

**Admitted Computer Print-Outs of Telephone Records Into Evidence.**

In the Appellee's Brief, the Government demonstrates that it is not able to perceive the distinction between Federal Rule of Evidence 803(6) and Federal Rule of Evidence 901(a) and (b)(9). Without discussing the issues of confrontation or cross-examination, the Government argues to this Court that compliance with F.R.E. 803(6) somehow automatically includes compliance with F.R.E. 901(a) and (b)(9). It suggests that F.R.E. 901(b)(9), if given recognition and effect, would "negate the intent of Rule 803(6) to allow the introduction of business records without the necessity of calling those who at all stages had part in the transaction." (Appellee's Brief, p. 22).

The Defendant WEGNER does not need to reiterate the argument made in his opening brief, nor is it necessary to cite again the authority for that argument. The drafters of the Federal Rules of Evidence did not include F.R.E. 901(a) and (b) without a specific purpose, and without recognizing the necessity to articulate a special rule dealing with a special problem involving conditional relevance. It recognizes that under some circumstances, which it attempts to treat by its terms (albeit not exhaustively and exclusively), a greater quantum of proof is required for authentication and identification of certain types of evidence than is generally required. This is because under some situations, like the one illustrated by F.R.E. 901(b)(9), unless an

essential fact upon which logical relevancy is based is proven by a means and through a witness capable of being cross-examined as to the existence of the essential fact, important constitutional rights are violated. Under these circumstances there is a grave danger of a jury being misled, and the burden of going forward with contradictory evidence is placed upon the defendant in a criminal case in a manner inconsistent with the burden of proof in a criminal trial. Were this not so, F.R.E. 104(b), 401, and 402 would have been sufficient to cover all questions of relevancy. This is the problem that is recognized in the cases cited in Appellant's Brief under Argument I.

It should be noted that this Court has recognized in the past that the fact that a piece of evidence falls within an exception to the hearsay rule does not necessarily mean that it satisfies the Sixth Amendment right to cross-examination and confrontation. *United States v. Peden*, 556 F.2d 278 (5th Cir. 1977); *McDaniel v. United States*, 343 F.2d 785 (5th Cir. 1965). In light of the fact that the cases cited in the Appellant's Brief (Argument I) *all* deal with computer evidence and that *none* of the cases cited in the Appellee's brief under Argument II do, it becomes obvious that this type of evidence does not fall within the purview of F.R.E. 803(6) unless it has been submitted in a manner consonant with F.R.E. 901(a) and (b)(9) so as to permit adequate confrontation and cross-examination to ensure that the jury will not be misled as to its trustworthiness. Any other interpretation of the relevant case law and F.R.E. 901(a) and (b) would inevitably result in the conclusion

that the drafters of the Federal Rules of Evidence performed a useless act by including the latter Rules.

The Government also seems to argue that even if the admission of this evidence is improper, it does not affect a "substantial right" of the Defendant WEGNER, and/or the issue was not properly preserved. The Government seems to emphasize that the defendant did not object to the admission of the same type of evidence from a subsequent government witness, and that this has some significance in determining whether reversible error occurred here. This argument fails upon examination of the facts of the case, and in light of the relevant federal case law dealing with the need to make repetitive objections to the same type of evidence offered and admitted into evidence after the trial court has been advised of the objection earlier and has made a clear ruling as to its admissibility.

An examination of the record will disclose that at no time during the testimony of Government witness Froehlich did counsel for Defendant WEGNER indicate that he had "no objection" to the admissibility of Government's Exhibits 9, 10, and 13. In fact, an earlier objection was noted by the trial court at the time it ruled on the admissibility of these Exhibits (Tr., p. 120). But most importantly, the recognized federal practice under the circumstances of this case does not require that the objection interposed by Defendant WEGNER as to the admission of Government's Exhibits 11 and 12 be repeated at the time that Exhibits 9, 10, and 13 were

admitted into evidence. *United States v. Bell*, 506 F.2d 207, 213, fn. 23 (D.C. Cir. 1974); *United States v. Allsup*, 485 F.2d 287, 290 (8th Cir. 1973); *Evalt v. United States*, 359 F.2d 534, 542 (9th Cir. 1966); *Sanchez v. United States*, 293 F.2d 260, 265 (8th Cir. 1961); cf., *Douglas v. Alabama*, 380 U.S. 514, 13 L.Ed.2d 934, 85 S.Ct. 1074 (1965); *Powell v. Zuckert*, 366 F.2d 634 (D.C. Cir. 1966).

The Appellant RICHARD WEGNER has demonstrated to this Court that the admissibility of these Exhibits had a profound effect upon the evidence considered by the jury, both in terms of the Exhibits themselves and what they allowed the prosecutor to introduce by way of attempting to corroborate otherwise suspect testimony of the accomplices. The effect carried through up to and including the summation of the prosecutor, and it cannot be said that this was harmless beyond a reasonable doubt.

## II

## The Defendant is Being Deprived of His Liberty Without Due Process of Law as a Result of Having Been Denied a Fair Trial.

The Defendant RICHARD WEGNER relies upon his opening brief and the cases cited therein in support of this argument. However, a fair reading of the record of the instant case with the conduct of the prosecutor being scrutinized under the proper standard, must lead this Court to conclude that the governmental misconduct so permeated this trial that reversal is man-

dated. In a recent Opinion of this Court, *United States v. Garza*, 608 F.2d 659 (5th Cir. 1979), this Court reversed a conviction in a case that is factually so close to the one *sub judice* that they are substantially indistinguishable. If anything, the conduct of the prosecutor in the instant case with respect to the offer made to the accomplice witness Acosta and the acting in concert with the district court to subvert the intent of Federal Rule of Criminal Procedure 35, makes the argument for reversal in the instant case even stronger than in *Garza*.

## CONCLUSION

The briefs of both sides now having been filed, and the issues and written arguments now having been closed, on the record before this Court justice can only be done by an Order reversing the judgment of the United States District Court for the Western District of Texas, vacating the sentence imposed pursuant thereto, and remanding this case for a new trial.

Respectfully submitted,

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702/382-7755

Attorney for Defendant-
Appellant

## CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing Reply Brief for Defendant-Appellant Wegner upon the following, postage prepaid:

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Assistant U.S. Attorney
United States Courthouse
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Ramon Garcia, Esq.
Garcia, Garcia & Allee
107 North Tenth Street
Edinburg, TX 78539

Dated this ____ day of April, 1980.

---

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702/382-7755
Attorney for Defendant-
Appellant

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 79-5262

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD WEGNER, et al.

Defendants-Appellants.

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Appeal from the United States District Court

for the Western District of Texas

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PETITION FOR REHEARING AND SUGGESTION FOR

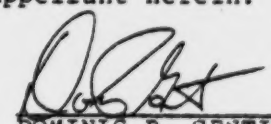
REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned, counsel of record, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Richard Wegner, Defendant-Appellant herein.



DOMINIC P. GENTILE, ESQ.
Attorney of Record for
RICHARD WEGNER

STATEMENT OF COUNSEL

PURSUANT TO LOCAL RULE 16.2.2

I expressly believe, based upon a reasoned and studied professional judgment, that this Appeal involves one or more questions of exceptional importance:

1. Whether or not a Defendant-Appellant appealing from a judgment of conviction in a criminal case entered in a United States District Court nas a constitutional right to demand the conscientious judgment of a United States Court of Appeals on every assignment of error properly raised before that Court in accordance with the Federal Rules of Appellate Procedure?

2. Whether or not the Defendant was deprived of his liberty without due process of law and a fair trial in light of the prosecution's misconduct in obtaining testimony, cross-examination and summation, and the Court's charge to the jury?

3. Whether or not RICHARD WEGNER was deprived of his rights to confrontation, cross-examination and effective assistance of counsel by the admission into evidence, without proper foundation, of computer print-outs of telephone toll records?

I further express the belief, again based upon a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Court of Appeals for the 5th Circuit, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court: United States v. Pendley, 522 F.2d 181 (5th Cir. 1975), United States v. Miller, 500 F.2d 751 (5th Cir. 1974),

United States v. Arteaga-Limones, 529 F.2d 1183 (5th Cir. 1976), United States v. Prejean, 594 F.2d 495 (5th Cir. 1974), United States v. Bourg, 598 F.2d 445 (5th Cir. 1979), Dunn v. United States, 307 F.2d 883 (5th Cir. 1962), United States v. Mendoza, 565 F.2d 1285, affirmed en banc, 581 F.2d 89 (5th Cir. 1978), United States v. Garza, 608 F.2d 659 (5th Cir. 1979).

DOMINIC P. GENTILE, ESQ.
Attorney of Record for Defendant-
Appellant-WEGNER

## ARGUMENT

### I.

### The Panel Deprived RICHARD WEGNER of His Rights Under the Fifth Amendment to the Constitution of the United States of America to Due Process and Equal Protection of the Law When It Failed to Consider an Assignment of Error Properly Raised, Briefed, and Presented to It.

The United States Supreme Court has held that there is no constitutional right to an appeal from a criminal conviction. Abney v. United States, 431 U.S. 656, 52 L.Ed.2d 651 (1977). However, in the federal system, it is clear that 28 U.S. Code §1291 provides a statutory right to appeal from a criminal conviction. Carroll v. United States, 354 U.S. 394, 1 L.Ed.2d 1442 (1957); Coppedge v. United States, 369 U.S. 438, 8 L.Ed.2d 21 (1962), that this right should not be frustrated, see Rodriquez v. United States, 395 U.S. 327, 23 L.Ed.2d 340 (1969), and that it carries with it both the right to counsel and concomitant duties upon counsel. These are the examining of the trial court record for errors and urging the reviewing court to grant relief therefrom. See Hardy v. United States, 375 U.S. 277, 11 L.Ed.2d 331 (1964).

As long ago as it's decision in Post v. Jones, 19 How. 150, 15 L.Ed. 618 (1856) the United States Supreme Court held that where the law gives a party an appeal, he has a right to demand the concientious judgment of the appellate court on every question arising in the cause. Post, supra, 60 U.S. at 160. This Circuit has likewise acknowledged that an appeal is an integral part of the trial system for finally adjudicating the guilt or innocence of a defendant. Thomas v. United States, 368 F.2d 941, 945 (5 Cir. 1966). It is therefore axiomatic that where alleged errors of the

trial court have been properly preserved and urged upon a United States Circuit Court of Appeals it has a duty to consider each of them before rendering judgment.

In the instant case RICHARD WEGNER presented two issues for review to this Court. The first was whether or not he was deprived of his rights to confrontation, cross-examination, and effective assistance of counsel by the admission into evidence without proper foundation, of computer print-outs of telephone toll records. In its per curiam opinion decided pursuant to Local Court Rule 21, the panel disposed of this issue by stating:

> "Defendant-Appellant WEGNER alleges that he was denied a fair trial, because he was deprived of his right to confrontation and cross-examination as guaranteed by the Sixth Amendment to the United States Constitution, when the court admitted computer print-outs of telepnone toll records into evidence, and we find this allegation of error to be without merit, and we affirm his conviction." Opinion of July 17, 1980 p. 2

The second issue presented to this Court by RICHARD WEGNER was whether or not the defendant was deprived of his liberty without due process of law and a trial in light of the prosecution's misconduct in obtaining testimony, cross-examination and summation, and the Court's charge to the jury. The argument in support of RICHARD WEGNER'S contention encompassed sixteen (16) pages of the Appellant's Brief and two additional pages in his Reply Brief. Two of his primary contentions in regard to that argument but were of such a nature as to require this Court to clarify the question as to whether United States v. Mendoza, 565 F.2d 1285, affirmed en banc, 581 F.2d 89 (5 Cir. 1978) permitted a trial judge to forestall ruling on a motion made pursuant to Rule 35 of the Federal Rules of Criminal Procedure until after tne Movant testified

on behalf of the Government, at the Government's request, some 210 days after sentence was imposed and some 90 days beyond the 120 day limitation on Rule 35 Motions. The second contention would have required this Court to either reverse or to distinguish the closing argument in the instant case from that of the United States v. Garza, 608 F.2d 659 (5 Cir. 1979). It was submitted in the Appellant's Brief and it is submitted in this Petition that the summation of the prosecutor in the instant case was even more predjudicial and inflamatory than that in Garza.

An examination of the three page opinion of the panel which is attached hereto and incorporated herein by reference as "Exhibit A" should quickly lead this Court to grant this Petition for Rehearing as it clearly demonstrates that the second issue presented for review was not given any consideration whatsoever by the panel and therefore deprived RICHARD WEGNER of due process of law and equal protection of the law as is guaranteed to him by the United States Constitution, Amendment 5. Surely if the Supreme Court's decision in Post, supra, is to be given any credence at all it must apply equally to all members of the class to which it is directed. This was not done in the instant case.

II.

RICHARD WEGNER was Deprived of His Liberty Without Due Process of Law and a Fair Trial in Light of the Prosecutor's Misconduct in Obtaining Testimony, Cross-Examination and Summation, and the Court's Charge to the Jury.

As has been stated in Argument I above the panel of this Honorable Court that rendered the decision and entered an order pursuant to Local Court Rule 21 in this case gave absolutely no

attention to the above captioned contention. Briefly stated, RICHARD WEGNER submits that his Constitutional guarantee of due process of law as provided by the 5th Amendment to the United States Constitution was violated as a result of the trial court's charge to the jury to the extent that it was based upon language in Count X of the indictment which unfairly and prejudicially permitted the jury to consider evidence not in the record and contrary to what was produced by the Government. This deprivation of fundamental due process was exacerbated by improper and prejudicial tactics use by the prosecutor in obtaining testimony, during cross-examination of the defendant's witnesses, and in summation. It is submitted that the prosecutor's misconduct alone was sufficient to require reversal and remand for a new trial.

The Defendant, RICHARD WEGNER asserted an alibi defense at his trial. Through the witnesses produced by the Government it was undisputed that October 20, 1977, was the date that the accomplices allegedly distributed marijuana to someone in the Chicago area whom they identified as the defendant. The accomplices also testified that the person they delivered to on October 20, 1977, was the same person that they delivered to on all the other occassions in the indictment. The defendant, RICHARD WEGNER called three disinterested witnesses to establish that on the date and time in question he was in fact in San Antonio, Texas and produced a public record which was signed by RICHARD WEGNER in the presence of two of the witnesses and notarized by one of them on the afternoon of October 20th, 1977, in San Antonio, Texas. The third alibi witness established that RICHARD WEGNER was in San Antonio that afternoon negotiating a real estate sale and that she saw nim

driving his car on that date.

RICHARD WEGNER submits that allowing the Government to use "on or about" language in an indictment and permitting the Court to instruct the jury that the Government need not prove the specific dates of an occurrance, in light of the facts of the instant case, resulted in a deprivation of due process and miscarriage of justice. This Court has previously recognized that said circumstances can exist. cf. United States v. Arteaga-Limones, 529 F.2d 1183 (5 Cir. 1976); See United States v. Prejean, 494 F.2d. 495 (5 Cir. 1974).

With respect to the prosecutor's misconduct RICHARD WEGNER submits that a practice which occurred in this case wherein the Government filed a motion before the sentencing judge in response to one of their witnesses' motion pursuant to Rule 35 of the Federal Rules of Criminal Proceedure, and requested of the judge that he not rule on the witness's Rule 35 request until after it had a chance to evaluate his testimony at the instant trial, resulted in a gross violation and misreading of this Court's opinion in United States v. Mendoza, 565 F.2d 1285, affirmed en banc, 581 F.2d 89 (5 Cir. 1978). While this Court sitting en banc gave some discretion to the district court in retaining jurisdiction beyond the 120 day limit established in rule 35, in the instant case the prosecutor utilized this as a tool to delay the ruling until after a trial which took place more than 80 days after the period established by Rule 35 has expired. Furthermore, this manipulation of Rule 35, with the sentencing court's cooperation, lead to a gross injustice and is a practice which should be quickly condemned and terminated by this Court.

Finally, the summation of the prosecutor in this case was

far worse than that in United States v. Garza, 608 F.2d 659 (5 Cir. 1979) wherein this Court reversed a conviction on that ground alone. Not only did the prosecutor call upon the jury to make inferences from the record that were totally impermissible and not substantiated by any evidence whatsoever, but through out his summation he utilized the word "we" when speaking of the actions of the DEA Agents in the investigation of the case and concluded such inflamatory comments as:

> And, last, quite honestly, I am going to make a plea for law enforcement because that is one word that has not become a dirty word in the San Antonio community yet. [Tr. p. 1547]

And also:

> I want to walk up to you and shake you by the shoulders and say, "can't you see, can't you see what's going on here?" [Tr. p. 1579, ln. 8-10].

It is respectfully submitted that this argument should not only have been considered by the panel but justice would require that it result in reversal and remand for a new trial.

III.

The Defendant was Deprived of His Right to Confrontation and Cross-Examination as Guaranteed by the Sixth Amendment to the United States Constitution When the Court Admitted Computer Print-Outs of Telephone Records into Evidence.

The opinion of the panel in this case is difficult to understand in light of the fact that they did not articulate a reason for finding the argument without merit. However it is respectfully submitted that reconsideration be given to it in light

of the fact that computerized business records present a problem different from the ordinary business records situation. An additional factor is present in these cases because the entry into the "books" is not made directly by a human and the accuracy of the program and of the record depends upon the working condition and accuracy of the equipment both at the time that the entry is first recorded and at the time that it is recalled. At the trial of this cause the witnesses used to lay the foundation for the admissibility of this evidence were unable to give first hand testimony as to the the foregoing and therefore did not comply with Federal Rule of Evidence 901 (a) and (b) (9) which dictates that when a computer "process or system is relied upon to establish the accuracy of the assertion which makes it's proffer relevant, then the proponent must produce evidence describing a process or a system used to produce a result and showing that the process or system produced an accurate result."

While this Circuit has never spoken directly to this issue and has obviated the need for making a decision on at least two cases, See United States v. Miller, 500 F.2d 751 (5 Cir. 1974) and United States v. Fendley, 522 F.2d 181 (5 Cir. 1975), it is respectfully submitted that evidence such as this is introduced in far to many criminal trials for it to continue to be ignored as an important issue. It is further submitted that in this particular case the introduction of such evidence permitted the prosecutor to introduce further "summary exhibits" by way of charts and other graphic representations and to make comment in summation calling for an explanation on the part of the defense.

## CONCLUSION

For the foregoing reasons, RICHARD WEGNER prays this Honorable Court to grant this petition, to rehear the matter and to grant him a new trial. He further suggests that the issues are of sufficient importance to warrant consideration en banc.

Respectfully submitted,

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(702)382-7755
Attorney for Defendant-Appellant,
RICHARD WEGNER

I hereby certify that I deposited in the United States Mail a copy of the foregoing PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC, postage prepaid, first class, addressed as follows:

Leroy Jahn, Esq.
Assistant U.S. Attorney
United States Courthouse
San Antonio, Texas

Ramon Garcia, Esq.
Garcia, Garcia & Allee
107 North Tenth Street
Edinburg, TX 78539

Philip D. Clark, Esq.
523 Main Street
San Antonio, TX 78204

Dated this 13th day of August, 1980.

An employee of DOMINIC P. GENTILE, LTD.

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-5262

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOE M. MALDONADO, FEDERICO CRUZ, and RICHARD WEGNER,

Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas

(JULY 17, 1980)

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

PER CURIAM:

Defendant-Appellant Joe M. Maldonado was convicted by a jury of conspiracy to possess marihuana, with intent to distribute, and possession of marihuana, with intent to distribute.

Defendant-Appellant Richard Wegner was convicted by a jury of conspiracy and aiding and abetting the possession of marihuana, with intent to distribute.

Defendant-Appellant Federico Cruz was convicted by a jury of conspiracy to possess marihuana, with intent to distribute, and of aiding and abetting the possession of marihuana, with intent to distribute.

EXHIBIT "A"

They have appealed their convictions, and oral argument was heard by the Court in New Orleans, Louisiana, on July 16, 1980.

Defendant-Appellant Maldonado alleges that the trial court erred in over-ruling his motion to suppress the marihuana that was seized from him at the time of his arrest, at a 24-hour roadblock, which had been set up by the Department of Public Safety officers of the State of Texas, for license and safety checks; and, further, that after his stop, the officers had no probable cause to search. Finding that the 24-hour systematic roadblock was not pretextual and his initial stop legal, and that probable cause thereafter existed for the search which revealed the marihuana in question, we affirm his conviction. See Delaware v. Prouse, ____ U.S. ____, 59 L.Ed.2d 660 (1979).

Defendant-Appellant Wegner alleges that he was denied a fair trial, because he was deprived of his rights of confrontation and cross-examination, as guaranteed by the Sixth Amendment to the United States Constitution, when the Court admitted computer print-outs of telephone toll records into evidence, and we find this allegation of error to be without merit, and we affirm his conviction.

Defendant-Appellant Cruz complains that the trial court erred in allowing into evidence before the jury evidence of an extraneous offense in its case in chief, and in allowing the prosecutors to argue and allude to this extraneous offense in his closing argument; further that the Court erred in not holding that he had standing to suppress evidence seized from other persons; that his rights were violated when the Government's evidence established the existence of multiple conspiracies

rather than the single conspiracy alleged in the indictment, and that his constitutional guarantee of confrontation of all adverse witnesses was violated when the trial court unduly restricted his cross-examination of a witness by the name of Acosta, when he testified for the Government. We find all of the contentions to be without merit, and, therefore, affirm his conviction.

AFFIRMED. See Local Rule 21.[1]

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1 See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

United States Court of Appeals

FIFTH CIRCUIT

Gilbert F. Ganucheau
Clerk

OFFICE OF THE CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

December 11, 1980

TO ALL PARTIES LISTED BELOW:

NO. 79-5262 - U. S. A. -vs- Joe M. Maldonado, et al

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By R. Adeline Barnes
Deputy Clerk

Mr. Philip D. Clark
Mr. Ramon Garcia
Mr. Dominic P. Gentile
Mr. Philip D. Clark
Mr. Gerald H. Goldstein
Mrs. LeRoy Morgan Jahn

EXHIBIT A